Supreme Court, U.S.
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In The

Supreme Court of the United States

JAMES W. SIKES and FELIX KEMP, Individually and on Behalf of All Other Persons Similarly Situated,

Petitioners,

v.

AMERICAN TELEPHONE & TELEGRAPH COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Has the Eleventh Circuit so far departed from the accepted and usual course of appellate review of class certification orders as to warrant an exercise of this Court's supervisory power? On appellate interlocutory review of a class certification order, can a circuit court weigh conflicting evidence and find facts contrary to the findings of the district judge, and thereby deny class certification? There are drastic differences among the circuits as to the scope of review and the deference to be accorded the district court, particularly as to findings of Federal Rule of Civil Procedure 23(b)(3) *superiority* and its fundamental element *manageability.*

2. In a class action under RICO to recover damages resulting from mail fraud and wire fraud, can proof of reliance be presented by common proof through use of inferences, circumstantial evidence or rebuttable presumptions recognized at common law, by other federal courts, and by this Court in *Basic Incorporated v. Levinson*, 485 U.S. 224, 245-247 (1988); or must reliance be proved, as the Eleventh Circuit held, only by individual class member testimony, thus rendering certification of any consumer fraud class action error as a matter of law due to unmanageability?

3. Does the presence of a single issue of state law as to fifty states automatically render a class action unmanageable as a matter of law and thus not superior under Rule 23(b)(3), as held by the Eleventh Circuit and contrary to holdings of the Third, Fifth and Ninth Circuits?

PARTIES TO THE PROCEEDING

The Petitioners are James W. Sikes and Felix Kemp, on behalf of themselves and on behalf of all other persons similarly situated. The Respondent is American Telephone & Telegraph Company (AT&T). Defendants Teleline, Inc. (Teleline) and U.S.A. Networks previously were Defendants, but were dismissed prior to entry of the order.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties to the Proceedings	ii
Table of Contents	iii
Table of Authorities	iv
Orders and Opinions Below	1
Jurisdictional Statement	1
Statutory Provisions and Federal Rule	2
Statement of the Case	2
Statement of Facts	2
Proceedings Below	7
Reasons for Granting the Writ	10
I. Scope of Appellate Review of Rule 23(b)(3) Findings	10
II. Proof of Reliance	16
III. Rule 23(b)(3) Superiority and Issues as to Multiple States' Laws	24
Conclusion	30

TABLE OF AUTHORITIES

Page

UNITED STATES SUPREME COURT CASES

Affiliated Ute Citizens v. United States, 406 U.S. 128 (1972) 19, 20

Amchem Products, Inc. v. Windsor, 521 U.S. 592 (1997) 17, 18, 24, 25

Basic Incorporated v. Levinson, 485 U.S. 224 (1988) .. 18, 19

Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974) 11

General Tel. Co. v. Falcon, 457 U.S. 147 (1982) 11

Herman & MacLean v. Huddleston, 459 U.S. 375 (1983) 18

Horner v. United States, 143 U.S. 207 (1892) 27

Sanabria v. United States, 437 U.S. 54 (1978) 26

Shutts v. Phillips Petroleum, 472 U.S. 797 (1985) 24

OTHER FEDERAL CASES

Andrews v. Am. Tel. & Tel. Co., 95 F.3d 1014 (11th Cir. 1996) 8, 11, 17, 27

Blackie v. Barrack, 524 F.2d 891 (9th Cir. 1975), *cert. denied*, 429 U.S. 816 (1976) 19

Bryan v. Amrep Corp., 429 F.Supp. 313 (S.D. N.Y. 1977) 20

Castano v. Am. Tobacco Co., 84 F.3d 734 (5th Cir. 1996) 20, 25

Chisolm v. South Fin. Corp., 194 F.R.D. 538 (E.D.Va. 2000) 23

Colonial Refrigerated Transportation, Inc. v. Mitchell, 403 F.2d 541 (5th Cir. 1968) 21

TABLE OF AUTHORITIES – Continued

Page

Cox v. Administrator U.S. Steel & Carnegie, 17 F.3d 1386 (11th Cir. 1994), *modified on other grounds*, 30 F.3d 1347 (11th Cir. 1994) 22

Davis v. Southern Bell Tel., 1993-2 Trade Cas. (CCH) ¶ 70,480 at 71,607 (S.D. Fla. 1993) 1993 WL 593999 20

Eisenberg v. Gagnon, 766 F.2d 770 (3d Cir. 1985) 11, 12

Esplin v. Hirschi, 402 F.2d 94 (10th Cir. 1968), *cert. denied*, 394 U.S. 928 (1969) 11

In re Ford Motor Co. Vehicle Paint Lit., 182 F.R.D. 214 (E.D.La. 1998) 20

In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Lit., 55 F.3d 768 (3d Cir. 1995) 25

In re Visa Check/Mastermoney Antitrust Lit., 280 F.3d 124 (2d Cir. 2001), *cert. denied*, 2002 WL 554313 (U.S.) 11, 15, 28

In the matter of Bridgestone/Firestone, Inc., 288 F.3d 1012 (7th Cir. 2002) 25

Jackson v. Motel 6 Multipurpose, Inc., 130 F.3d 999 (11th Cir. 1997) 11

Kahan v. Rosenstiel, 424 F.2d 161 (3d Cir.), *cert. denied*, 398 U.S. 950 (1970) 11

Kirkpatrick v. J.C. Bradford & Co., 827 F.2d 718 (11th Cir. 1987), *cert. denied*, 485 U.S. 959 (1987) 20

Michaels Building Co. v. Ameritrust Co., 848 F.2d 674 (6th Cir. 1988) 20

Peterson v. H&R Block Tax Services, Inc., 174 F.R.D. 78 (N.D. Ill. 1997) 20

TABLE OF AUTHORITIES – Continued

Page

Porter v. American Optical Corp., 641 F.2d 1128 (5th Cir. 1981), *cert. denied*, 454 U.S. 1109 (1981) 22

Rutherford v. American Bank of Commerce, 565 F.2d 1162 (10th Cir. 1977) 22

Rutstein v. Avis Rent-A-Car Sys., Inc., 211 F.3d 1228 (11th Cir. 2000) 11

Sikes v. American Tel. & Tel. Co., 179 F.R.D. 342 (S.D.Ga. 1998) 1

Sikes v. Teleline, Inc., 281 F.3d 1350 (11th Cir. 2002) 1

Spark v. MBNA Corp., 178 F.R.D. 431 (D.Del. 1998) 23

Stirman v. Exxon Corp., 280 F.3d 554 (5th Cir. 2002) 25

United States v. Graham, 858 F.2d 986 (5th Cir. 1988) 22

United States v. Hammond, 821 F.2d 473 (8th Cir.), *cert. denied*, 484 U.S. 986 (1987) 26

United States v. Miller, 22 F.3d 1075 (11th Cir. 1994) 27

United States v. Pepe, 747 F.2d 632 (11th Cir. 1984) 27

United States v. Pinnelli, 890 F.2d 1461 (10th Cir. 1989), *cert. denied*, 494 U.S. 1038 (1990) 26

United States v. Plotke, 725 F.2d 1303 (11th Cir. 1984) 22

United States v. Rackley, 742 F.2d 1266 (11th Cir. 1984) 22

TABLE OF AUTHORITIES – Continued

Page

United States v. Sellers, 483 F.2d 37 (5th Cir. 1973), *overruled on other grounds*, 905 F.2d 829 (5th Cir. 1990) 27

United States v. Sklaroff, 506 F.2d 837 (5th Cir. 1975), *cert. denied*, 423 U.S. 874 (1975) 27

United States v. Weiner, 3 F.3d 17 (1st Cir. 1993) 27

United States v. Whitaker, 372 F.Supp. 154 (M.D.Pa. 1974) 27

Valentino v. Carter-Wallace, Inc., 97 F.3d 1227 (9th Cir. 1996) 25

Windham v. American Brands, Inc., 565 F.2d 59 (4th Cir. 1977) 28

Yaffe v. Powers, 454 F.2d 1362 (1st Cir. 1972) 11

STATE CASES

Adams v. Little Missouri Minerals Ass'n, 143 N.W.2d 659 (N.D. 1966) 20

Amato v. General Mot. Corp., 11 Ohio App.3d 124, 463 N.E.2d 625 (1982) 20

Cope v. Metropolitan Life Ins. Co., 82 Ohio St.3d 426, 696 N.E.2d 1001 (1998) 20

Davis v. Re-Frac Manufacturing Corp., 276 Minn. 116, 149 N.W.2d 37 (1967) 21

Doctors Hosp. v. Bonner, 195 Ga.App. 152, 392 S.E.2d 897 (1990) 21

G.A. Carney, Ltd. v. Brzeczeb, 117 Ill.App.3d 478, 453 N.E.2d 756 (Ill.App. 1983) 28

TABLE OF AUTHORITIES – Continued

Page

Hunter v. McKenzie, 197 Cal. 176, 239 P. 1090 (1925) 21

Iris Amusement Corp. v. Kelly, 366 Ill. 256, 8 N.E.2d 648 (1937) 28

Mobil Oil Corp. v. Danforth, 455 S.W.2d 505 (Mo. 1970) (*en banc*) 28

Occidental Land, Inc. v. Superior Court, 18 Cal. 3d 355, 134 Cal.Rpt. 388 (1976) 20

People v. Eagle Food Centers, Inc., 31 Ill.2d 535, 202 N.E.2d 473 (1964) 28

Poulsen v. Treasure State Industries, Inc., 626 P.2d 822 (Mont. 1981) 21

State ex rel. Gendening v. Letz, 591 S.W.2d 92 (Mo. 1979) 28

Varacallo v. Massachusetts Mut. Life Ins. Co., 332 N.J. Super. 31, 752 A.2d 807 (2000) 20

Vasquez v. Superior Court of San Joaquin County, 4 Cal.3d 800, 94 Cal.Rptr. 796, 484 P.2d 964 (1971) 20

Watson v. Garner, 183 Minn. 233, 236 N.W. 213 (1931) 21

Weinberg v. Hertz Corp., 116 A.D.2d 1, 499 N.Y.S.2d 693 (1986) 20

Witzig v. Philips, 144 N.W.2d 266 (Minn. 1966) 21

ENGLISH CASE

Gibson v. Hunter, 2 H.Bl. 288, 126 Eng.Rep. 557 (C.P. 1794) 21

TABLE OF AUTHORITIES – Continued

Page

FEDERAL STATUTES

18 U.S.C. § 1084(a) 27
18 U.S.C. § 1084(b) 27
18 U.S.C. § 1955 ..... 2, 26
18 U.S.C. § 1955(b) 26
18 U.S.C. § 1961(6) 2, 26, 27
18 U.S.C. § 1962(c) 2, 26, 27
18 U.S.C. § 1964 7
18 U.S.C. § 1964(c) 2, 26, 27
28 U.S.C. § 1292(b) 9
28 U.S.C. § 1331 7
28 U.S.C. § 2101(c) 1
47 U.S.C. § 207 7
Fed.R.Civ.P. Rule 23 12
Fed.R.Civ.P. Rule 23(a) 12
Fed.R.Civ.P. Rule 23(b)(3) ..... *passim*

MISCELLANEOUS

1 Devitt, Blackmar, Wolff & O'Malley, *Federal Jury Practice and Instructions* § 17.07 22
Rest., Contracts § 479 19
Supreme Court Rule 13.1 1

TABLE OF AUTHORITIES – Continued

Page

Supreme Court Rule 13.3 1

Williston on Contracts, § 1515 19

ORDERS AND OPINIONS BELOW

Order of the district court certifying a class under Rule 23(b)(3). App. 37.

Order of the Eleventh Circuit dismissing AT&T's appeal of the certification order. App. 90.

Discovery order entered March 24, 1997. App. 92.

Discovery order entered August 7, 1997. App. 96.

Order of the district court denying cross motions for summary judgment and the Defendant's motion to decertify the class, reported as *Sikes v. American Tel. & Tel. Co.*, 179 F.R.D. 342 (S.D.Ga. 1998). App. 50.

Order of the district court certifying the case for interlocutory review. App. 80.

Order of the Eleventh Circuit reversing class certification, reported as *Sikes v. Teleline, Inc.*, 281 F.3d 1350 (11th Cir. 2002). App. 1.

Order of the Eleventh Circuit denying the Petition for Rehearing and Suggestion of Rehearing *En Banc*. App. 84.

JURISDICTIONAL STATEMENT

Petitioners seek review of a decision of the United States Court of Appeals for the Eleventh Circuit issued February 13, 2002. The petition for rehearing was denied April 11, 2002. The mandate issued April 19, 2002. Jurisdiction is founded upon 28 U.S.C. § 2101(c) and Supreme Court Rules 13.1, 13.3. This petition does not raise issues

as to the constitutionality of an Act of Congress or of a state law.

STATUTORY PROVISIONS AND FEDERAL RULE INVOLVED

Statutes and the rule involved in this case are set out in the appendix and include:

18 U.S.C. § 1955

18 U.S.C. § 1961(6)

18 U.S.C. § 1962(c)

18 U.S.C. § 1964(c)

Rule 23(b)(3), Fed.R.Civ.P.

STATEMENT OF THE CASE

Statement of Facts

Plaintiff James Sikes is the father of a then ten-year-old child who had repeatedly called the Let's Make A Deal 900-Number Game of Chance, incurring charges on his parents' telephone bill in excess of $500 through approximately 48 telephone calls. (R19-143-18-19) Plaintiff Felix Kemp is the grandfather of a child who also placed a number of calls to the game, for which Mr. Kemp paid substantial telephone charges. (R19-143-8-12) The game operated between 1990 and December 1992. A vigorous advertising campaign in the form of television commercials featuring Monty Hall, the former host of the extremely popular television program "Let's Make a Deal," solicited callers to play the game by calling the 900 number listed in the ads, with the telephone subscribers, such

as Mr. Sikes and Mr. Kemp, being billed by AT&T for the charge to play the game. (R19-143-48)

Callers played the game by dialing a "900" number. With a 900 number, callers are billed for the "information" or "service" provided to the caller by the company using the 900 number and not for telecommunication services. (R19-143-42,48) The charges for the "information" or "service" are billed on callers' long distance phone bills through an arrangement called "billing and collection services" entered into between the promoter and the phone company operating the 900 number. The advent of the technology and the change of legal structure for billing and collecting of 900-number call charges converted telephone lines into charge accounts for callers to purchase non-telecommunications goods and services, such as playing a lottery. (*Id.*)

The "Let's Make a Deal" 900-Number Game was created by former defendant Teleline, a now insolvent entity that has been dismissed. (R19-143-45, 157-58) Teleline was located in California. The game was marketed through television commercials featuring game show host Monty Hall, who repeatedly announced his intention to "give away $2,000 in cash instantly," without disclosing the very slim chances – 1 in 2,700 – of winning the announced prize. (R19-143-30, 131-33) Rather, players were told "you can't win if you don't call." (*Id.*) Defendant USA Networks – with whom Plaintiffs settled – advertised the game over its nationwide cable television network.

The Let's Make A Deal 900-Number Game was a game of chance in which players paid to play by calling a 900 number. Callers heard a recorded message, and were asked to answer a trivia question by selecting one of three

possible answers. The caller indicated his "answer" by pushing a button on his touchtone phone. The caller then was given chances to win additional prizes by selecting, by chance, from one of several numbered "doors," again by use of the touchtone phone. Winners at each "level" could take a chance to win a larger prize by selecting the number of the correct "door" at the next level, going up to the "grand prize." If the caller failed to select the number for the winning "door" at any level, all previously "won" prizes were forfeited. (R7-208-exs. A & B; R11-238-63-65) Players had to progress through six prize levels to have a chance to win the $2,000 prize. App. 121. The game was structured to prolong each call. Callers were charged $3.88 per minute. The charge to play the game could easily exceed $20 per call. (R1-29-1; R19-143, ex. P-2; Tab 1) AT&T collected these charges, with the charge appearing on the AT&T portion of the telephone bill sent to the subscriber for the telephone from which the call to the 900 number was placed. (R19-143-44-45; R11-238-391-392) The charge for the call on AT&T's 900-number line to play the Let's Make A Deal 900-Number Game was the charge, or "consideration," for playing this game of chance. (R19-143-42-45)

AT&T assisted in designing the Let's Make A Deal 900-Number Game and in writing the script heard by those who played the game. *AT&T reviewed and approved the ads used to solicit calls and the message scripts heard by callers.* (R11-238-26-33, ex.17) (Script copy at App. 121.) Charges for the telecommunication services necessary to operate this 900-number game were billed to Teleline. (R19-143-45) AT&T had written billing and collection contracts with Teleline for AT&T to collect from telephone

subscribers all charges for calls made to play Let's Make A Deal. (R11-238-72; R7-208, ex. C)

Most of the calls to play the Let's Make A Deal 900-Number Game were received by AT&T at the "AT&T Infoworx" facilities in Missouri. A few calls were received by AT&T in Illinois on similar interactive machines. (R11-238-59; R15-153-42-43) These facilities had AT&T's computerized machines that answered the calls, played the messages heard by the callers, received the callers' "selections" made by touchtone key pad, recorded electronically whether and what the caller "won" or "lost," captured the number from which the call was made, and determined the charge for playing the game. (R5-149-143-144, 306; R11-238-61-62) AT&T would then bill and collect that charge. (R5-149-391-392; R19-143-44-45) AT&T provided Teleline with the name and address of "winners" and of the "prize" that callers had "won." (R5-149-339) At all times, AT&T was the party to receive complaints and to determine who would and who would not have to pay for playing its Let's Make A Deal 900-Number Game. (R19-143-64-65) AT&T also provided loans to Teleline in the form of its "Fast Cash" receivables financing program to provide money for ads to solicit more calls to the game. (R11-238-79) *AT&T's compensation for its role in the Let's Make A Deal 900-Number Game operation included a percentage of the gross billing for charges to play the game of chance*, plus its charges to operate the game at its Infoworx facilities, plus its "telecommunication" charges for its 900-number lines. (R19-143-49) App. 111.

AT&T provided Teleline with monthly statements that set out the gross billing, chargebacks, uncollectibles, and fees charged by AT&T for operation, billing, and collection for the Let's Make A Deal 900-Number Game. App. 110,

159, 168. AT&T's call detail records list the number from which each call to the game was made, and the charge therefor. The call detail data also lists the telephone numbers and amounts for credits, chargebacks, and uncollectibles. (R9-234-1-4, ex. I) App. 158. These AT&T records show that AT&T's gross billing of charges to play the Let's Make A Deal 900-Number Game was $23,877,227.88 with net collections of $19,451,212.29. (R11-238-104-106, exs. 23, 24) AT&T deducted approximately $4,000,000 from its collections for its percentage share. (R19-143-48)

AT&T's 900-number operations were managed from the AT&T Multiquest Action Center in Illinois. (R10-235, ex. Q) AT&T Multiquest had an executive committee to advise AT&T how it could promote its participation in 900-number programs. The chairman of that committee was, at all times, Robert Lorsch, who was also President of Teleline. (R19-143-51; R11-238-93-94)

AT&T required Teleline to provide AT&T with an attorney opinion letter assessing the legality of the game under the gambling laws of the United States and all fifty states. (R8-221, ex. 9,¶ 226) Teleline's submission stated that the elements of a lottery are chance, prize and consideration, but that the presence of a mail-in alternative game ("free alternative means of entry") might eliminate consideration as to those who paid to play by calling the 900 number. App. 144. This letter does not cite any attorney general opinions, statutes or state appellate court decisions which hold that 900-number charges to play a game of chance are not consideration to play a lottery. The letter does not take into consideration the legal doctrine that gambling legality or illegality, when interstate phone calls are involved, may be determined by the law of the

locations where the phone calls were received – which here were *only* Illinois and Missouri. (*Id.*)

Proceedings Below

This case was filed November 25, 1992 with federal jurisdiction asserted under 18 U.S.C. § 1964, 28 U.S.C. § 1331 and 47 U.S.C. § 207, and a pendant state law claim under Georgia law. An extensive class certification hearing was held in May, 1994, producing a 240-page transcript. Among other evidence, Judge Bowen heard testimony from five witnesses, listened to deposition excerpts from five additional witnesses, and reviewed documents, computer records and videos. By order dated May 13, 1994, Judge Bowen certified a class pursuant to Federal Rule 23(b)(3). App. 37. AT&T appealed the class certification order to the Eleventh Circuit asserting jurisdiction under the collateral order doctrine. (R5-144-1) The appeal was dismissed. App. 90.

A hearing was held on the notice issue, and notice was ordered. Plaintiffs spent over $496,000 implementing the notice. (R6-190-5) Plaintiffs mailed the court-approved notice to every class member whose name and address was then available to Plaintiffs, including class members who were identified during the notice program. The names and addresses of opt-outs were filed with the court. (R6-191-1, ex. A) A small settlement with USA Networks was approved. (R6-194-1-5) Discovery was reopened. (R6-201-1-3)

Plaintiffs moved for summary judgment on the gambling law issue. (R6-204-1) AT&T filed a cross motion for partial summary judgment. (R7-216-1) In October 1996, AT&T moved to decertify the class in light of the Eleventh

Circuit's holding in *Andrews v. Am. Tel. & Tel. Co.*, 95 F.3d 1014 (11th Cir. 1996). (R11-239-1)

In response to orders compelling further discovery from AT&T, AT&T moved the court to stay its orders to produce data that AT&T had erased from computer format, citing the extreme time and cost involved in reclaiming that data. *AT&T asserted to the court that individual caller data was not needed "to assess or calculate damages in this case."* App. 92, 96, 116, 118.

Under the district court rules applicable to this case, mandatory disclosure of the names and addresses of all witnesses and of all experts a party may call at trial was required prior to the close of discovery. Plaintiffs' answers, as amended, listed the names of thirteen possible witnesses and five possible experts. App. 103-107. AT&T's answers listed no witnesses and no experts. App. 100-102. The time to list additional witnesses expired at the close of discovery. The complaint demanded a jury trial. (R1-1-24) However, all parties filed statements agreeing to trial without a jury. App. 102, 108. The record before the court in 1998 included not only the original submissions on class certification, but also voluminous further submissions by the parties. Thus, the district court assessed the motion to decertify with a record before it under which Plaintiffs could call no more than eighteen witnesses and AT&T did not propose to call any witnesses, and with AT&T representing to the court that individual class member payment data was not necessary to assess damages.

On March 26, 1998, the court entered a forty-one-page order analyzing the issues in the case, denying the cross motions for summary judgment, and denying the motion to decertify the class. App. 50. The court dealt at great length with the ramifications of *Andrews v. Am. Tel. & Tel. Co.*, 95 F.3d 1014 (11th Cir. 1996). AT&T moved to certify its decision for interlocutory review under 28 U.S.C. § 1292(b). (R13-278-1) Plaintiffs opposed the motion, noting that discovery was closed and that Plaintiffs were ready for trial. (R13-283-1-8) The district court, however, certified the denial of decertification. (R13-287-1-3) The United States Court of Appeals for the Eleventh Circuit accepted the case for interlocutory review. (R13-289-1)

By opinion issued February 13, 2002, the Eleventh Circuit reversed the district's findings of predominance and superiority under Rule 23(b)(3), holding that the district court had committed errors of law in finding that adjudication of the issues of reliance, injury and damages could be managed. App. 1. The Circuit Court held that, as a matter of law, reliance, injury and damage could only be proven on an individual basis by each class member. App. 21, 23, 29-32. The Circuit Court further held that if, "the laws of all fifty states apply, that alone would render the class unmanageable." App. 35, n.44. In the assessment of facts, the Circuit Court repeatedly reached conclusions contrary to factual determinations made by the district court and contrary to evidence in the record. App. 27-31, 43-46, 156-168.

The petition for rehearing and suggestion of rehearing en banc was denied. App. 84.

REASONS FOR GRANTING THE WRIT

I

SCOPE OF APPELLATE REVIEW OF RULE 23(b)(3) FINDINGS

The Court should grant certiorari to clarify the proper scope of appellate review of a Rule 23(b)(3) determination. In particular, the Court should decide whether, on appellate interlocutory review of class certification, should an appellate court weigh conflicting evidence against the factual assessments of the district judge and against certification of a class? There are drastic differences among the circuits as to the scope of review and the deference to be accorded the district court, particularly as to Rule 23(b)(3) findings of *superiority* and its fundamental element *manageability*. Petitioners assert that the Eleventh Circuit has so far departed from the accepted and usual course of appellate review of class certification orders as to call for an exercise of this Court's supervisory power.

In the context of class certification review, there is a great need for guidance from this Court, for such terms as *abuse of discretion*, *rigorous analysis*, *error of law*, and *avoidance of an analysis of the merits* in practice now have widely varying meanings, to the extent that the standard for obtaining class certification in the Eleventh Circuit is drastically different from that in other circuits, particularly, the First, Second, Third and Tenth circuits.

In the present case and in prior decisions, the Eleventh Circuit, although quoting the *abuse of discretion* standard, has undertaken essentially plenary *de novo* review of orders certifying class actions, and all too readily

reversed district court findings of "superiority" under Rule 23(b)(3). App. 1, 18-35. *Rutstein v. Avis Rent-A-Car Sys., Inc.*, 211 F.3d 1228, 1233, 1241 (11th Cir. 2000); *Jackson v. Motel 6 Multipurpose, Inc.*,130 F.3d 999, 1006 (11th Cir. 1997); *Andrews v. Am. Tel. & Tel. Co.*, 95 F.3d 1014, 1022, 1024 (11th Cir. 1996) (majority and Barkett, J., dissenting).

The Third and Tenth Circuits have recognized a presumption in favor of certification. *Eisenberg v. Gagnon*, 766 F.2d 770, 785 (3d Cir. 1985); *Kahan v. Rosenstiel*, 424 F.2d 161, 169 (3d Cir.), *cert. denied*, 398 U.S. 950 (1970); *Esplin v. Hirschi*, 402 F.2d 94, 101 (10th Cir. 1968), *cert. denied*, 394 U.S. 928 (1969) (in doubtful cases, err in favor of certification).

The First and Second Circuits express a strong view that disfavors denial of certification due to perceived manageability problems. *In re Visa Check/Mastermoney Antitrust Lit.*, 280 F.3d 124, 140 (2d Cir. 2001), *cert. denied*, 2002 WL 554313 (U.S.); *Yaffe v. Powers*, 454 F.2d 1362, 1365 (1st Cir. 1972).

The Eleventh Circuit's plenary review of class certification is not consistent with this Court's direction that, on the issue of class certification, a court should not consider "whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974).

The role of district courts and the scope of appellate review is in great need of clarification. A district court must conduct a "rigorous analysis" to determine whether the requirements of Rule 23 have been met. *General Tel. Co. v. Falcon*, 457 U.S. 147, 161 (1982). Nonetheless, the rules have not been held to require formal findings of fact

and conclusions of law in an order determining class certification. *Eisenberg v. Gagnon*, *supra*, 766 F.2d at 785. Case law provides almost no guidance as to how formal evidentiary presentations on class certification should be or how firm the evidentiary support need be for findings as to Rule 23 requirements. There is no doubt that whether a particular class action is certified or whether the certification is affirmed today depends to a great extent upon the circuit in which the action is filed and the individual judge to whom the case is assigned.

This case presents an excellent, singular vehicle for resolution of the appropriate review of class certification decisions, particularly as to Rule 23(b)(3) issues. There is an extensive factual record. The district court went to great lengths to articulate its analysis of the Rule 23(a) and 23(b)(3) issues in both the original order granting certification and the order denying decertification. App. 37, 50. The Circuit Court decision is a lengthy counterpoint to the district court's opinion and thus this is an excellent case for this Court to analyze the Eleventh Circuit's approach to review of class certification orders and to evaluate and offer guidance as to the appropriate scope of appellate review. App. 1.

Plaintiffs were ready for trial and had an articulated trial plan, with up to eighteen witnesses, proposing to tender class-wide proof for liability, causation, reliance and damages. The key depositions for authenticating documents and billing records and for proof of what the ads, telephone scripts and billings communicated, and did not communicate, had been taken for use at trial and were in the district court's record. Plaintiffs' counsel represented to the court that the Plaintiffs' case could be presented in five days. The district court expressed a willingness to review the gambling law of every state to assess the illegal lottery

issue. App. 45, 59, 81. The case Plaintiffs proposed to try was patently manageable.

The Eleventh Circuit rejected Plaintiffs' trial plan and substituted a patently unmanageable plan in which all 300,000 class members should be called to testify as to their by then decade-old memory of what ads they saw, what phone messages they heard, what they relied upon, how much AT&T charged them for each call and whether each charge was paid. App 28-29, 31, 34-35. In effect, the Eleventh Circuit prejudged issues of admissibility of evidence, credibility of witnesses, persuasiveness of the Plaintiffs' case, the probative value of AT&T's business records and the persuasiveness of AT&T's defenses. Is such not a merits assessment in a class certification review?

This case provides an excellent vehicle to provide much needed clarification on critical questions: What should *abuse of discretion* mean as to Rule 23(b)(3) assessments? Should the appellate court take an *any evidence* approach, or a *weight of the evidence* view? What deference should be accorded the district court's conclusions and the district court's willingness to, in fact, manage the case? What constitutes *an error of law* in this context?

This case presents all these issues. For example, the circuit opinion treats the district court's statement that under the evidence before it "reliance could be virtually presumed" as a ruling of law on this issue rather than a factual observation as to how obvious reliance is when one responds to a television ad by making an expensive telephone call to a number one could not have possibly known about from any source other than the ad. Compare App. 44, 56 with App. 21.

The district court reviewed the ads and received the testimony as to legally immaterial variations that were in the ads – primarily the per-minute price of the calls, the value of the prizes and the 900 number to call – and concluded that the ads were substantially similar enough for class certification. App. 43-44, 56. On appellate review, the Circuit Court reached the contrary conclusion. App. 28. As to the submission of all ads and game scripts to AT&T, Teleline's President swore he did. App. 155, 166. AT&T presented a witness who said he didn't. The Circuit Court cites the failure to submit as an undisputed fact. App. 28. The Circuit Court held:

> The district court employed a presumption on the plaintiffs' behalf on the issues of injury and damages, deciding to forgo an individualized inquiry on these elements of the plaintiffs' claims.

App. 29. Absolutely no such *presumption of damages* language can be found in the district court's orders. App. 37, 50. The district court did review the computer records created by AT&T and sent to Teleline that purport to reflect every call, every charge and every "chargeback" for unpaid or refunded calls, and concluded that "damages do not present a significant hurdle." App. 45, 56, 110, 156-159, 166-168. On appeal, the Eleventh Circuit credited an AT&T executive who had stated that he understood that some local telephone companies gave credits for 900-number charges to some customers but did not tell AT&T. The court below seized upon this vague evidence which was patent hearsay, disregarded the district court's conclusions and contrary record evidence, and held that the only way to prove damages would be through the testimony of each class member. App. 31.

How can evidentiary use of a defendant's detailed business records be fairly called a legal "presumption . . . on the issues of injuries and damages" and an error of law?

Should an appellate court on review of a class certification order predetermine what business records can or cannot be tendered in evidence at trial and the persuasiveness of such evidence?

The scope of appellate review exercised by the Eleventh Circuit stands in stark contrast to the restrained and deferential approach exhibited by the Second Circuit in *Visa Check*, in which the court stressed the need to avoid merits analysis, held that not even the district court should assess the credibility of conflicting evidence or decide whether evidence that the plaintiff proposes to present at trial "will ultimately be persuasive." *Visa Check*, 280 F.3d at 135.

As to manageability, the Second Circuit held:

> Nevertheless, failure to certify an action under Rule 23(b)(3) on the sole ground that it would be unmanageable is disfavored and should be the exception rather than the rule.
>
> . . .
>
> We emphasize that the issue of manageability of a proposed class action is always a matter of justifiable and serious concern for the trial court and particularly within its discretion.

Id. at 140, 141 (internal quotation marks omitted). The court further recognized "powerful policy considerations that favor certification" and stated that a court should compare the management challenges of a class action to the burdens of numerous individual actions, something not done by the Eleventh Circuit. *Id.*, at 146

The Eleventh Circuit's approach to appellate review of class certification certainly reflects no deference to the

district court's analysis of the evidence, no deference to findings by the district court as to the superiority of a class action over individual actions by each class member, and no deference to the willingness of a district court to manage and try the case. The Eleventh Circuit simply arrogated to itself complete freedom to assess the credibility of witnesses and evidence. The Eleventh Circuit labels factual observations of the district court as legal presumptions. App. 21, 29.

The cases cited in this brief reflect a drastic variance of approaches by federal district courts and courts of appeals as to class certification and appellate review of such orders. The Eleventh Circuit has strayed far from the restrained deferential appellate review exhibited by other circuits. It is a matter of great importance and it is ripe for this Court's attention.

II

PROOF OF RELIANCE

The Eleventh Circuit held, as a matter of law, that victims' reliance in a consumer fraud class action must be proved on an individual class member basis without the benefit of inferences, presumptions or circumstantial evidence that might establish reliance without individual class member testimony. This rule of law conflicts with holdings of this Court, other courts of appeals, and established common law principles, and if left to stand will render unmanageable all consumer fraud class actions. Certiorari should be granted to resolve the existing disagreement on this issue.

The only legal method recognized by the Eleventh Circuit for proof of reliance is individual testimony by each

of the 300,000 class members, supposedly based upon its previous holding in *Andrews v. Am. Tel & Tel. Co.*, 95 F.3d 1014 (11th Cir. 1996). According to that court:

> In *Andrews*, we made clear that, even assuming that the plaintiffs could prove a scheme to defraud and misrepresentations in furtherance of that scheme, "the plaintiffs would still have to show, *on an individual basis*, that they relied on the misrepresentations."

App. 21 (emphasis by the court).

The Eleventh Circuit then held that the district court erred as a matter of law because it had concluded that the issue of *reliance* did not render the class action unmanageable and that, therefore, a class action was superior. The Eleventh Circuit centered its finding on a statement by the district court in its 1994 order that, under the evidence before it, reliance "could be virtually presumed." *Id.*

The Eleventh Circuit rejected, as a matter of law, any presumption of reliance outside a securities "fraud on the market" context, or any common proof of reliance by inferences or circumstantial evidence. App. 21-27. That rule of law effectively bars all consumer fraud class actions and ends class action relief under RICO for victims of mass wire fraud and mail fraud. The decision creates a two-tier system of justice whereby victims of mass securities fraud get class relief; but victims of mass consumer fraud do not, and the perpetrators get to keep their ill-gotten gains. Both the spirit of the Eleventh Circuit's analysis and its holding are inconsistent with what this Court noted in *Amchem*:

> Predominance is a test readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws. *See* Adv. Comm. Notes, 28 U.S.C. App., p.697.

Amchem Products, Inc. v. Windsor, 521 U.S. 592, 625 (1997). The court below ignored the obvious: recognition of common issues contemplates common proof.

The enactment of the federal securities laws led to the establishment of federal common law that would effectuate those laws. E.g. *Herman & MacLean v. Huddleston*, 459 U.S. 375, 388-390 (1983). Common law doctrines relating to fraud provided guidance, but were not deemed controlling. See *Basic v. Levinson*, 485 U.S. at 253 (White, J., dissenting). The Enactment of federal RICO for the first time created a federal cause of action for victims of enterprises engaged in interstate mail fraud. A federal "common law" for such is likewise necessary, and is being enunciated in cases such as this one. App. 21-27, 30. As the Eleventh Circuit decision demonstrates, the federal common law of civil mail fraud liability can be impeded by barriers that render the statute unusable in a class action context. Alternatively, this Court can look to long-recognized principles found in the common law that allow proof of *causation* and *reliance* by inferences, circumstantial evidence and logical factual rebuttable presumptions that can be presented by common class-wide proof. When an enterprise elects to extract money from thousands *en mass*, why should its actions not be adjudicated *en mass*?

Established common law principles and long-recognized rules of evidence do not compel creation of *de facto* civil immunity for perpetrators of standardized mail and wire fraud. This Court and the common law recognize

the appropriateness of rebuttable presumptions in fraud cases. In his seminal work, Williston stated:

> Where representations have been made in regard to a material matter and action has been taken, in the absence of evidence showing the contrary, it will be **presumed** that the representations were relied on.

Williston on Contracts, § 1515, p. 480 (emphasis added) The Restatement provides:

> **§ 479. When Fraud or Material Misrepresentation is Presumably an Inducing Cause.**
>
> Where fraud or misrepresentation is material with reference to a transaction subsequently entered into by a person deceived thereby, it is assumed in the absence of facts showing the contrary that it was induced by the fraud or misrepresentation.

Rest., Contracts § 479. Furthermore, statements in *Basic v. Levinson*, 485 U.S. 224, 245-47 (1988) include:

> Presumptions typically serve to assist courts in managing circumstances in which direct proof, for one reason or another, is rendered difficult. . . . Arising out of considerations of fairness, public policy, and probability, as well as judicial economy, presumptions are also useful devices for allocating the burden of proof between parties . . . . The presumption [of reliance] is also supported by common sense and probability . . . "who would knowingly roll the dice in a crooked crap game?"

Accord, *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 153 (1972) (reliance presumed); *Blackie v. Barrack*,

524 F.2d 891, 906 n.22 (9th Cir. 1975), *cert. denied*, 429 U.S. 816 (1976) *Kirkpatrick v. J.C. Bradford & Co.*, 827 F.2d 718, 724 (11th Cir. 1987), *cert. denied*, 485 U.S. 959 (1987); *Michaels Building Co. v. Ameritrust Co.*, 848 F.2d 674, 679 n.8 (6th Cir. 1988) (infer reliance from material misrepresentation); *Peterson v. H&R Block Tax Services, Inc.*, 174 F.R.D. 78, 84 (N.D. Ill. 1997) (presumption of reliance in RICO class action); *Bryan v. Amrep Corp.*,429 F.Supp. 313, 320 (S.D. N.Y. 1977) (presumption of reliance from omissions, following *Affiliated Ute*); *Davis v. Southern Bell Tel.*, 1993-2 Trade Cas. (CCH) ¶ 70,480 at 71,607 (S.D. Fla. 1993), 1993 WL 593999 (presumption of reliance); *Adams v. Little Missouri Minerals Ass'n*, 143 N.W.2d 659, 684 (N.D. 1966); *Vasquez v. Superior Court of San Joaquin County*, 4 Cal.3d 800, 812-813, 94 Cal.Rptr. 796, 484 P.2d 964, 973 (1971) (inference of reliance to class from material misrepresentations); *Cope v. Metropolitan Life Ins. Co.*, 82 Ohio St.3d 426, 435, 696 N.E.2d 1001, 1008 (1998); *Amato v. General Mot. Corp.*, 11 Ohio App.3d 124, 127, 463 N.E.2d 625, 629 (1982); *Weinberg v. Hertz Corp.*, 116 A.D.2d 1, 7, 499 N.Y.S.2d 693, 696 (1986); *Occidental Land, Inc. v. Superior Court*, 18 Cal. 3d 355, 363, 134 Cal.Rpt. 388, 392 (1976); *Varacallo v. Massachusetts Mut. Life Ins. Co.*, 332 N.J. Super. 31, 49, 752 A.2d 807, 817 (2000). But see *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 745 (5th Cir. 1996); *In re Ford Motor Co. Vehicle Paint Lit.*, 182 F.R.D. 214, 221 (E.D.La. 1998).

The Eleventh Circuit's holding that the state of mind known as *reliance* can be proven only by individual class member testimony is contrary to long-standing common law precedent:

> The defendant in error humbly submits, that it is competent to a jury to find matters of fact,

> without direct or positive testimony of those facts, and upon circumstantial evidence only, although the inference or conclusion to be drawn from the circumstances proved, be not absolutely certain or necessary. That it is sufficient if the circumstantial evidence be such as may afford a fair and reasonable presumption of the facts to be tried, and if the evidence has that tendency it ought to be received, and left to the consideration of the jury, to whom alone it belongs to determine upon the precise force and effect of the circumstances proved, and whether they are sufficiently satisfactory and convincing to warrant them in finding the fact in issue.

Gibson v. Hunter, 2 H.Bl. 288, 126 Eng.Rep. 557, 561 (C.P. 1794).

At common law, reliance upon a fraud may be proved by circumstantial evidence. E.g., *Poulsen v. Treasure State Industries, Inc.*, 626 P.2d 822 (Mont. 1981); *Hunter v. McKenzie*, 197 Cal. 176, 239 P. 1090 (1925); *Davis v. Re-Frac Manufacturing Corp.*, 276 Minn. 116, 149 N.W.2d 37 (1967). Circumstantial evidence of reliance may be more reliable than a fraud victim's direct testimony. *Colonial Refrigerated Transportation, Inc. v. Mitchell*, 403 F.2d 541, 549 (5th Cir. 1968) ("In law, as elsewhere, actions may speak louder than words."); *Witzig v. Philips*, 144 N.W.2d 266, 270 (Minn. 1966) ("[T]he facts and circumstances surrounding the situation are the best measure of whether there was reliance or not."). *Doctors Hosp. v. Bonner*, 195 Ga.App. 152, 164, 392 S.E.2d 897, 907 (1990) ("[R]eliance is subject to proof by circumstantial evidence."). The court in *Watson v. Garner*, 183 Minn. 233, 237, 236 N.W. 213, 215 (1931), affirmed a fraud recovery in a case in which the victim did not testify, holding:

> The testimony of a party that he relied upon representations made to him is, at most, only a statement as to his own mental reaction or state of mind. While he may directly so testify, such facts as intent, belief, and reliance, are perhaps more cogently shown by the facts and circumstances surrounding a transaction and the acts of the parties in relation thereto. The rule that fraud cannot be presumed does not mean that fraud may not legitimately be deduced from circumstantial evidence.

Circumstantial evidence as proof of a state of mind is a fundamental and essential part of the law of evidence. Without it, how would specific intent crimes be proven beyond a reasonable doubt? *See, e.g., United States v. Graham*, 858 F.2d 986, 991-92 (5th Cir. 1988); *United States v. Rackley*, 742 F.2d 1266, 1272 (11th Cir. 1984); *United States v. Plotke*, 725 F.2d 1303, 1306 (11th Cir. 1984); 1 Devitt, Blackmar, Wolff & O'Malley, *Federal Jury Practice and Instructions* § 17.07. As the Eleventh Circuit held in *Cox v. Administrator U.S. Steel & Carnegie*, 17 F.3d 1386, 1400 (11th Cir. 1994), *modified on other grounds*, 30 F.3d 1347 (11th Cir. 1994):

> Under the federal standard for the sufficiency of evidence, a plaintiff may prove causation by circumstantial evidence. *Porter v. American Optical Corp.*, 641 F.2d 1128, 1142 (5th Cir. 1981), cert. denied, 454 U.S. 1109, 102 S.Ct. 686, 70 L.Ed.2d 650 (1981). "Inferences from circumstantial facts may frequently amount to 'full proof' of a given theory, and may on occasion even be strong enough to overcome the effect of direct testimony to the contrary." *Rutherford v. American Bank of Commerce*, 565 F.2d 1162, 1164 (10th Cir. 1977).

This consumer fraud class action against AT&T presents fraudulent material omissions of fact not disclosed in any of the Let's Make A Deal ads, the recorded telephone messages that AT&T played for callers, or the bills that AT&T sent to collect charges for playing the game. There is unrebutted evidence of affirmative response to the ads and the bills, in that the calls were made and the bills were paid. See *Spark v. MBNA Corp.*, 178 F.R.D. 431, 436 (D.Del. 1998) ("logical" to presume reliance when class members respond to an ad); *Chisolm v. South Fin. Corp.*, 194 F.R.D. 538, 560 (E.D.Va. 2000) (class member's action is evidence of reliance).

Whether the evidence is called *circumstantial evidence*, an *inference*, or a *rebuttable presumption*, this Court should grant certiorari to determine whether these modes of proof can be sufficient to carry the burden in a consumer fraud class action brought under federal law and thus render such class actions manageable and thus superior to individual actions by each victim. Should it be error, as a matter of law, to certify a class in which plaintiffs propose to present their case on *reliance* through the use of recognized inferences and circumstantial evidence, but without calling each individual class member? Such is what the Eleventh Circuit has held. App. 21-27. The issue of how a party may seek to prove *reliance* calls for this Court's attention.

This Court's recognition that circumstantial evidence, inferences and rebuttable presumptions can be used to prove reliance in a RICO wire fraud or mail fraud action will provide relief for victims of frauds who otherwise will have no such relief. Such should provide a powerful deterrent to those who would perpetrate such schemes. As this Court noted:

> The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem. . . .

Amchem, 521 U.S. at 617.

III

RULE 23(b)(3) SUPERIORITY AND ISSUES AS TO MULTIPLE STATES' LAWS

This Court should grant certiorari to determine whether the presence of an issue of law on which the states may differ *per se* defeats a finding of superiority under Rule 23(b)(3). The Eleventh Circuit has held that the presence of such an issue of law renders a class action unmanageable as a matter of law. This ruling conflicts with rulings of the Third, Fifth and Ninth Circuits.

The Eleventh Circuit did not analyze the substance of the state law issue presented to it on appeal, but simply held that when "the laws of all fifty states apply, that alone would render the class unmanageable." App. 35, n.44. This holding is inconsistent with the spirit of *Shutts v. Phillips Petroleum*, 472 U.S. 797 (1985). This Court should grant certiorari to determine whether the issue of manageability of class actions that raise issues of multi-state law, even the law of fifty states, should be addressed as a matter of discretion or as a matter of *per se* unmanageability. The presence of a single issue of law from multiple states should not *per se* defeat the superiority

requirement of Rule 23(b)(3) and should not constitute an abuse of discretion as a matter of law if a district court determines it to be manageable. Other circuits have held that multiple state law issues do not *per se* defeat certification. *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1230 (9th Cir. 1996); *In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Lit.*, 55 F.3d 768, 815 (3d Cir. 1995); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 741; *Stirman v. Exxon Corp.*, 280 F.3d 554, 564 (5th Cir. 2002). Further evidence of the division of authority is shown by the Seventh Circuit, which has held that class actions asserting state law claims from fifty states are not manageable. *In the matter of Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1015 (7th Cir. 2002).

The issue of state law and the record in this case present an excellent opportunity for this Court to resolve this important issue because the issue, in fact, is quite manageable and thus demonstrates why the Rule 23(b)(3) issues of *superiority* and *predominance* should be matters of district court discretion rather than a *per se* rule of unmanageability. The latter is an abdication of the court's responsibility to determine whether the state law issue actually impairs manageability and, indirectly *predominance* and *superiority*.

It is undisputed that private lotteries are illegal in all states, and that all states define lotteries as requiring prize, chance, and consideration. App. 143-144. It is undisputed that the Let's Make A Deal 900-Number Game is a game of chance offering prizes to winners. The only state law issue presented is: Does the availability of a possible free alternative means of playing eliminate "consideration" as to those who paid to play? App. 144.

This is a simple and narrow state law issue easily managed by a district court. In cross-motions for summary judgment, both Plaintiffs and Defendant extensively briefed the issue. (R6-205-1-15; R7-219-15-23; R11-246-5-12; R13-275-1-5) In denying both parties' summary judgment motions, the trial court declined to rule upon these purely legal questions at that time. App. 65. But the underlying facts are not in dispute, and the legal issue is essentially the same as is routinely addressed by a federal district court trying defendants accused of operating a multi-state "bookie" operation in violation of 18 U.S.C. § 1955. The fact that the telephone calls from bettors to the booking operation may have come from many, or even most, of the states to the bookie's office does not deter a federal court from being able to manage a criminal trial. The issue presented by this civil claim based upon illegal gambling as defined by 18 U.S.C. § 1955 should not produce questions of law any more complex or any less manageable than does a criminal charge of violating that statute.

The gambling law claim asserts that AT&T is liable to the class under 18 U.S.C. § 1964(c) because it collected illegal debts from the class. Liability arises under 18 U.S.C. § 1962(c). 18 U.S.C. § 1961(6) defines "unlawful debt." Federal law defines an illegal gambling business. 18 U.S.C. § 1955(b).

A business is an illegal gambling business under federal law if the gambling is illegal in either the state where telephone calls are made or received, or if the gambling is illegal in a state where business of the enterprise is conducted. *Sanabria v. United States*, 437 U.S. 54, 71 (1978); *United States v. Pinnelli*, 890 F.2d 1461, 1469 (10th Cir. 1989), *cert. denied*, 494 U.S. 1038 (1990); *United*

States v. Hammond, 821 F.2d 473, 476 (8th Cir.), *cert. denied*, 484 U.S. 986 (1987); *United States v. Sklaroff*, 506 F.2d 837, 839 (5th Cir. 1975), *cert. denied*, 423 U.S. 874 (1975); *United States v. Sellers*, 483 F.2d 37, 45 (5th Cir. 1973) ("Bookies *take* bets ...."), *overruled on other grounds*, 905 F.2d 829, 833 (5th Cir. 1990); *United States v. Whitaker*, 372 F.Supp. 154, 158 (M.D.Pa. 1974). *See also* 18 U.S.C. §§ 1084(a),(b), 1302; *Horner v. United States*, 143 U.S. 207 (1892).

One who collects gambling debts for a gambling business is a participant in that business. *United States v. Miller*, 22 F.3d 1075, 1078 (11th Cir. 1994); *United States v. Weiner*, 3 F.3d 17, 23 (1st Cir. 1993); *United States v. Pepe*, 747 F.2d 632, 645 (11th Cir. 1984). "Collection" for purposes of RICO, means "inducing in any way any person to make repayment." *Id.* at 674.

Thus the debts incurred for calls to the Let's Make A Deal 900-Number Game are illegal debts within the meaning of 18 U.S.C. § 1961(6) if the game's operation was illegal under the gambling laws of *any* state where the enterprise was operated or any state from which calls were made or to which calls were made. The majority and dissent in *Andrews* recognized that the issue of legality of the gambling debts as to all class members might be resolved by the law of a single state. *Andrews*, *supra*, 95 F.3d at 1024, 1027.

As noted in the statement of facts, all calls were answered by AT&T either in Missouri or Illinois. Determination of illegality in Illinois or Missouri should obviate the need to look to the laws of other states to adjudicate AT&T's liability under 18 U.S.C. §§ 1961(6), 1962(c), and 1964(c).

Examination of the relevant authority of these two states demonstrates the manageability of this issue, whether for two states or fifty. *Mobil Oil Corp. v. Danforth*, 455 S.W.2d 505 (Mo. 1970) (*en banc*); *State ex rel. Gendening v. Letz*, 591 S.W.2d 92, 100 (Mo. 1979); *People v. Eagle Food Centers, Inc.*, 31 Ill.2d 535, 202 N.E.2d 473, 475 (1964); *G.A. Carney, Ltd. v. Brzeczeb*, 117 Ill.App.3d 478, 453 N.E.2d 756, 760 (Ill.App. 1983) ("If, as here, the controlling inducement is the lure of an uncertain prize, then the business is a lottery."); *Iris Amusement Corp. v. Kelly*, 366 Ill. 256, 8 N.E.2d 648, 653 (1937). This law and other state gambling law was fully briefed to the Eleventh Circuit, but was not reviewed in the opinion due, apparently, to the asserted *per se* unmanageability of such. App. 35, n.44.

The attorney opinion letter AT&T required as a precondition of its approval of the Let's Make A Deal 900-Number Game purported to analyze all relevant law both state and federal. App. 143-154. It is routine for businesses that operate nationally to assess all laws that might affect their business. Why should such a task be deemed so daunting for a federal district court willing to undertake it? See App. 45, 59-60, 81.

This case presents an excellent opportunity to address the appropriate assessment of the Rule 23(b)(3) issues presented to a federal court in a class action that asserts a federal cause of action with an interstitial state law issue. Should it be a matter of discretion or a *per se* handcuff on the power of the federal courts? Should a district court willing to manage state law issues be afforded particularly broad discretion? See *Visa Check*, 280 F.3d at 141; *Windham v. American Brands, Inc.*, 565 F.2d 59, 65 (4th Cir. 1977).

The *per se* rule of unmanageability as to multi-state legal issues conflicts with the discretionary standard adopted by other circuits, removes discretion from the trial judge on this important Rule 23(b)(3) issue, assumes a low level of competency in the federal district courts, and effectively emasculates the civil relief provisions of RICO for those from whom illegal gambling debts have been collected by a national enterprise. This *per se* rule diminishes the power of federal courts to adjudicate matters of national importance. The present division among the circuits creates a condition wherein some federal courts are empowered to resolve major multi-state disputes and others are not. This Court's intervention is imperative to produce some semblance of coherence and consistency.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be granted.

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INDEX TO APPENDIX

Page

Orders on Class Certification

Opinion of the United States Court of Appeals for the Eleventh Circuit issued February 13, 2002 ..... App. 1

Order of the United States District Court for the Southern District of Georgia granting class certification, May 13, 1994 ..... App. 37

Order of the United States District Court for the Southern District of Georgia denying motion to decertify class, March 26, 1998 ..... App. 50

Order of the United States District Court for the Southern District of Georgia granting certification for interlocutory review entered October 7, 1998 ..... App. 80

Order of the United States Court of Appeals for the Eleventh Circuit granting interlocutory review, January 5, 1999 ..... App. 83

Order of the United States Court of Appeals for the Eleventh Circuit denying petition for rehearing April 11, 2002 ..... App. 84

Relevant Statutes and Court Rule

18 U.S.C. § 1955 ..... App. 86

18 U.S.C. § 1961(6) ..... App. 88

18 U.S.C. § 1962(c) ..... App. 88

18 U.S.C. § 1964(c) ..... App. 88

Rule 23(b)(3), Fed.R.Civ.P ..... App. 88

INDEX TO APPENDIX – Continued

Page

Other Orders of the District Court and Court of Appeals

Order of the United States Court of Appeals for the Eleventh Circuit dismissing appeal of AT&T, January 27, 1995 ..... App. 90

Order of the United States District Court for the Southern District of Georgia granting in part Plaintiffs' motion to compel discovery, March 24, 1997 ..... App. 92

Order of the United States District Court for the Southern District of Georgia affirming Magistrate's March 24, 1997 order, August 7, 1997 ..... App. 96

Submissions to the District Court by the Parties

Local Rule 8.6 submissions by AT&T, January 28, 1993 ..... App. 100

Amended Local Rule 8.6 submission by Plaintiffs, March 10, 1997 ..... App. 103

Excerpts from AT&T motion for relief from order compelling discovery, June 4, 1998 ..... App. 116

Relevant Evidentiary Materials

Telephone script for Let's Make A Deal 900-Number Game ..... App. 121

Attorney Opinion letter provided to AT&T by Teleline ..... App. 143

Excerpts from deposition testimony of Robert Lorsch ..... App. 155

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-8007

D.C. Docket No. 92-00147-CV-6

JAMES W. SIKES,
FELIX KEMP, Individually and On
Behalf of All Other Persons Similarly Situated,

Plaintiffs-Appellees,

versus

TELELINE, INC, USA NETWORKS,

Defendants,

AMERICAN TELEPHONE & TELEGRAPH COMPANY,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Georgia

(Filed February 13, 2002)

Before TJOFLAT, WILSON and FLETCHER*, Circuit Judges.

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* Honorable Betty B. Fletcher, U.S. Circuit Judge for the Ninth Circuit, sitting by designation.

TJOFLAT, Circuit Judge:

American Telephone & Telegraph Corporation ("AT&T") appeals the district court's certification, pursuant to Fed. R. Civ. P. 23(b)(3), of a class of plaintiffs who present claims arising from a "900-number" telemarketing program. We conclude that the district court abused its discretion in holding that the questions of law or fact common to the members of the proposed class predominate over any questions affecting only individual members and that, therefore, the class would be manageable.[1] We therefore reverse the certification of the class and remand for further proceedings.

I.

A.

In *Andrews v. American Telephone & Telegraph Co.*, 95 F.3d 1014 (11th Cir. 1996), we held that the district court erred in certifying two classes under Rule 23(b)(3)[2] of

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[1] Our decertification of the class based upon predominance negates the need to address whether providing notice of this action by means of publication rather than by individual notice was proper. *See Andrews v. Am. Tel. & Tel. Co.*, 95 F.3d 1014, 1021 (11th Cir. 1996).

[2] Federal Rule of Civil Procedure 23(a) and (b) provide:

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

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the Federal Rules of Civil Procedure because the plaintiffs had failed to demonstrate that common issues predominated.[3] The first class of plaintiffs, the "Andrews class," brought suit against various telecommunications carriers and services providers, alleging that several 900-number

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(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

[3] *Andrews* involved two related appeals that the court "treat[ed] . . . in the same opinion because the appellants raise[d] similar issues and appeal[ed] the same class certification order." *Andrews*, 95 F.3d at 1018. The first class was the "Andrews class" and the second class was the "Harper class."

telephone programs,[4] which the defendants were providing to the public, were

> gambling activity [that] is illegal under the laws of all of the fifty states, and constitutes racketeering activity in violation of the federal RICO statute, 18 U.S.C. §§ 1961 to 1968 (1994), the Communications Act of 1934, 47 U.S.C. §§ 201 to 229 (1994), and the federal common law of communications law.
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> [The] complaint further allege[d] that the defendants committed mail and wire fraud, in violation of 18 U.S.C. §§ 1341 & 1343 (1994), in furtherance of a RICO enterprise .... In addition to the allegations concerning a national gambling enterprise, [the plaintiffs] allege[d] that the defendants ... violated Georgia statutes that prohibit the operation of a gambling business within that state.

Id. at 1019 (internal citations and quotations omitted).

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[4] The court explained:

> Pay-per-call, or "900-number," telephone service was developed in the early 1980s. It was first used for telephone polling and other interactive programs designed to disseminate a wide variety of information to customers, who were usually billed for the calls in their monthly phone bills. After its inception, the 900-number industry rapidly expanded to encompass varied news, sports, weather, and entertainment information programs, as well as promotional and giveaway contests. While the specifics of different 900-number programs vary greatly, their basic operation is the same: callers are enticed by television commercials, direct mail solicitation, or other advertising materials to call a 900 number, for which the callers are charged either a flat fee per call or a per-minute rate.

Id. at 1018-19.

The district court certified a master class and a Georgia subclass, the master class consisting of

> [a]ll persons who paid for one or more 900-number telephone calls billed and collected by [two of the defendants], which calls were made in connection with programs offering sweepstakes, games of chance, awards, cash or other prizes, gifts, or information on unclaimed funds.

Id. at 1020-21. Finding that the court had abused its discretion in certifying the master class,[5] we held that while

> [i]t may be true that, at a general level, the predominant issue presented in *Andrews* is whether the [defendants] were involved in the operation of illegal gambling schemes that used 900 numbers to facilitate caller participation . . . , as a practical matter, the resolution of this overarching common issue breaks down into an unmanageable variety of individual legal and factual issues.

Id. at 1023. Drawing on *Pelletier v. Zweifel,* 921 F.2d 1465, 1499-1500 (11th Cir. 1991), for the proposition that "each plaintiff must demonstrate reliance on deceptive conduct in furtherance of [an] alleged RICO scheme," we stated that "[t]he class's mail and wire fraud allegations . . . are not wholly subject to class-wide resolution." *Id.* at 1023-24. As to the claims based upon state gambling laws, we held that "the need to interpret and apply the gaming laws of all fifty states to assess the legality of each 900-number

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[5] We did not disturb the district court's determinations regarding standing under Fed. R. Civ. P. 23(a). *Id.* at 1022-23.

program [is] foremost among the difficulties in trying the gambling claims on a class basis." *Id.* at 1024.

The second class of plaintiffs, the "Harper class," brought suit against various telecommunications carriers and services providers that offered several 900-number programs to the public. The plaintiffs alleged that the defendants had committed mail and wire fraud, thereby violating federal RICO and Georgia RICO, "by approving and mailing misleading promotional and solicitation materials [for 900 numbers regarding credit cards] and by collecting the revenues produced by caller participation." *Id.* at 1021. The court certified a master class and a Georgia subclass, to include

> persons who paid for one or more 900-number telephone calls billed and collected by [two of the defendants], which calls were made in connection with programs offering credit cards, financial information services, catalog cards, or information on obtaining credit cards or catalog cards.

Id.

We were "even more certain that the *Harper* class is unsustainable under Rule 23(b)(3)" than we were about the Andrews class, because "individual issues abound and are magnified by the necessity of applying diverse state laws to programs that in many cases have little in common beyond their use of 900 numbers." *Id.* at 1024. After noting the significant problem that "the [multiple] 900-number programs at issue . . . differ widely" in many respects, we held that the class was unsustainable because of the individualized nature of the plaintiffs' claims:

> Even if it could be shown that the appellants were engaged in a scheme to defraud and made

> misrepresentations to further that scheme, the plaintiffs would still have to show, *on an individual basis,* that they relied on the misrepresentations, suffered injury as a result, and incurred a demonstrable amount of damages. As [with the Andrews class], the problems with trying the individualized elements of the plaintiffs' claims, as well as handling the unique aspects of the 900-number programs, are compounded by the necessity of referencing fifty sets of credit card and consumer protection laws.

Id. at 1025 (emphasis added) (internal citations omitted).

B.

The case at bar presents facts that are almost identical to those involved in the *Andrews* case, with one variation. Instead of multiple 900-number programs being challenged, in this case there is only one: the "Let's Make a Deal" program ("LMAD"). The district court described LMAD as follows:

> This automated interactive telephone game was modeled on the television game show of the same name. The game had up to six levels, and at each level the caller could win a prize by selecting the correct "door" behind which the prize was concealed. Upon winning a prize, the caller could either accept that prize or advance to the next level. If the caller chose to advance, any previously awarded prize was forfeited in exchange for a chance at a larger prize. Plaintiffs claim that the odds of ultimately winning the maximum $2,000.00 cash prize were 1 in 2,700.

Sikes v. Am. Tel. & Tel. Co., No. CV-692-147 (S.D. Ga. Mar. 26, 1998) at 2-3.[6] Plaintiffs, individuals who had called

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[6] A transcript of a recorded call to the program, appended to the plaintiffs' complaint, reveals the following presentation:

> Man's Voice: "Hi, I'm Monty Hall. Welcome to the all new Let's Make a Deal Telephone Game."
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> Woman's Voice: "Now you have a chance to win $2,000.00[. T]o go right into the game press one now. Let's Make a Deal is brought to you by Teleline, Inc., at a cost of $3.88 per minute and an average length per call is six minutes. If you do not want to play hang up now."
>
> Music.
>
> Monty Hall: "Now you have a chance to win great cash prizes at every level, all the way up to $2,000.00. That's right, friend, if you reach the top level of the game you can win $2,000.00 instantly right on this call. And if you win the $2,000.00 grand prize, you can receive your prize on the next business banking day. That's right. You could be $2,000.00 richer on the next business banking day. So let's get ready to play."
>
> Music.
>
> Monty Hall: "Press one if you are calling from a touchtone phone."
>
> Caller presses one.
>
> . . . .
>
> Monty Hall: "On TV, I used to ask contestants if they had an unusual object. Of course, I can't do that now so instead I'm going to ask you a question. Ready?" Applause.
>
> Monty Hall: "The Kennedy Space Center is named for which [P]resident? Press one for Franklin Roosevelt, press two for John F. Kennedy, press three for James Monroe."
>
> Caller enters number.
>
> Music.
>
> Monty Hall: "You're right."
>
> Applause.

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Monty Hall: "Now there are three doors up on the stage with me. Behind one of those doors is a valuable prize. Which door do you choose? Press one, two or three."

Caller presses number.

Monty Hall: "Let's see, yes, that's the right door and here's Jane to tell you what you have chosen."

Jane: "It's a bag full of shiny nickels worth $15.00 in cash. (Applause.) The prize will be paid to you the player in the form of a check made out to you the player. Congratulations from Let's Make a Deal."

Monty Hall: "Now it's time to make your decision. You can take your prize and leave the game now or you can keep playing and try for a more valuable prize on the next level, level 2."

Jane: "Monty, the prize on the next level is $25.00 cash. Behind one of the doors on level 2 is $25.00 cash."

Monty Hall: "But remember, one of the doors will have a bigger prize but two of the doors will not. Do you want to risk what you have won? Press one if you want to keep your prize and quit now. Press two if you want to keep playing."

Caller presses number.

Applause.

Monty Hall: "Great. I'm glad you want to keep playing. Now we are on the second level. Behind one of the three doors is a valuable prize."

Jane: "And Monty, that prize is $25.00 in cash."

Monty Hall: "Which door do you choose? Press one, two or three."

Caller presses number.

. . . .

Weird noise.

Monty Hall: "Oh, dear, you chose the wrong door. Here's Jane to tell you what you could have won."

Jane: "You could have won [an amount of money]."

("Ahhhhhhhhhh."[)]

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LMAD and incurred charges (in excess of any winnings they may have received), brought suit, individually and on behalf of all others similarly situated, in the United States District Court for the Southern District of Georgia.[7] The plaintiffs sued: (1) Teleline, Inc. ("Teleline"), the creator and operator of LMAD; (2) the U.S.A. Network, which broadcast a portion of the television advertising for LMAD; and (3) AT&T, which acted as Teleline's telecommunications carrier and billing contractor.

Count One of the plaintiffs' complaint[8] asserted that the defendants had violated the federal Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 ("federal RICO").[9] Section 1962(c) criminalizes participation "in the conduct of an enterprise's affairs through a

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> Jane: "But instead, you chose the wrong door. You gave it a good try and we hope you enjoyed playing Let's Make a Deal."
>
> Music.

[7] The named plaintiffs are James W. Sikes and Felix Kemp. These two individuals are the named plaintiffs for both the master class and the Georgia subclass described *infra*.

[8] We refer throughout to the plaintiffs' amended complaint, filed May 7, 1993, simply as "the complaint." Plaintiffs' original complaint was filed on November 11, 1992.

[9] We note that the plaintiffs' complaint is yet another example of what we have often criticized as "shotgun pleadings," where each count "incorporates" all of the preceding paragraphs and counts. We have harshly criticized such shotgun pleadings in the past, and we repeat our displeasure with this type of complaint now. *See, e.g., Magluta v. Samples*, ___ F.3d ___, No. 00-12540 (11th Cir. 2001); *Cramer v. Florida*, 117 F.3d 1258, 1263 (11th Cir. 1997); *Ebrahimi v. City of Huntsville Bd. of Educ.*, 114 F.3d 162 (11th Cir. 1997); *Cesnik v. Edgewood Baptist Church*, 88 F.3d 902, 905 and n.9 (11th Cir. 1996); *Anderson v. Dist. Bd. of Trs. of Cent. Fla. Cmty. Coll.*, 77 F.3d 364, 366-67 (11th Cir. 1996); *Pelletier v. Zweifel*, 921 F.2d 1465, 1517-18 (11th Cir. 1991).

pattern of racketeering activity or collection of unlawful debt."[10] Section 1962(d) criminalizes conspiracy to do the same.[11] Section 1964(c) permits a civil plaintiff to sue for recovery of costs, attorneys' fees, and treble damages sustained as a result of a defendant's violation of section 1962.[12]

Count One alleged that the defendants had violated sections 1962(b),[13] (c), and (d) by engaging in a pattern of

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[10] 18 U.S.C. § 1962(c) provides:

It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

[11] 18 U.S.C. § 1962(d) provides:

It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

[12] 18 U.S.C. § 1964(c) provides:

Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final.

[13] Section 1962(b) provides:

It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in,

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racketeering activity that included "numerous acts of connected, related and continuing mail and wire fraud with the advertisement and solicitation of calls to [LMAD's 900 numbers], the answering of each individual 900 number call to these number[s], and the billing and collection of charges for each such 900 number call." Such activity was allegedly in violation of the wire and mail fraud statutes, 18 U.S.C. §§ 1341 and 1343,[14] which satisfy the definition of "racketeering activity" as set forth in section 1961(1)(B).[15] Further, Count One asserted that the defendants engaged in an illegal gambling business, in violation of 18 U.S.C. § 1955,[16] by operating LMAD. The plaintiffs alleged that this illegal gambling business constituted racketeering activity under section 1961(1)(B) and the continued operation of LMAD established a pattern of racketeering activity. Finally, Count One asserted that each charge incurred by a caller to LMAD's 900 numbers constituted a gambling debt, which is an unlawful debt within the meaning of section 1961(6). The defendants' billing and collection of this unlawful debt thus constituted unlawful debt collection. Since Count One asserted that the defendants had violated sections 1962(c) and (d) by engaging in and conspiring to engage in a pattern of racketeering activity (wire and mail fraud and

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or the activities of which affect, interstate or foreign commerce.

[14] *See infra* note 25.

[15] 18 U.S.C. § 1961(1)(B) defines racketeering activity, in pertinent part, as: "any act which is indictable under any of the following provisions of title 18, United States Code . . . section 1341 (relating to mail fraud), section 1343 (relating to wire fraud)."

[16] *See infra* note 42.

illegal gambling) and collection of unlawful debt, the plaintiffs prayed for relief according to section 1964(c).[17]

Count Two of the complaint alleged that the plaintiffs were the beneficiaries of a contract between AT&T and Teleline, and that AT&T's failure to enforce the terms of the contract caused direct injury to the plaintiffs. Count Three alleged that AT&T violated provisions of the Federal Communications Act of 1934, as amended, 47 U.S.C. §§ 151 *et. seq.* Specifically, Count Three asserted that AT&T's participation in LMAD was unjust and reasonable in violation of 47 U.S.C. § 201,[18] and that AT&T's crediting or refunding of LMAD charges to some but not all customers was a discriminatory practice in violation of 47 U.S.C.

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[17] The substantive discussion *infra* Part III focuses only on the propriety of class certification with respect to the federal RICO claims, for that is what the parties have briefed before this court. Our analysis applies equally, however, to the appropriateness of class certification with respect to the other counts of the complaint.

[18] 47 U.S.C. § 201 provides, in pertinent part:

> (a) It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; and, in accordance with the order of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes.
>
> (b) All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulations that is unjust or unreasonable is declared to be unlawful.

§ 202.[19] The plaintiffs thus prayed for relief under 47 U.S.C. § 206.[20] Count Four was brought under the Georgia Racketeer Influenced and Corrupt Organizations Act, O.C.G.A. § 16-14-1 *et seq.* ("Georgia RICO"), on behalf of those plaintiffs who had lost money because of their participation in LMAD while in the State of Georgia (the "Georgia plaintiffs"). The Georgia plaintiffs alleged that the defendants' LMAD activities constituted the predicate acts of theft by taking and theft by collection, and that these acts constituted a pattern of racketeering activity in violation of O.C.G.A. § 16-14-4. Count Five alleged that the ongoing conduct of LMAD constituted "a nuisance and a nuisance per se threatening harm to the general public." The plaintiffs thus sought "declaratory relief," as well as preliminary and permanent injunctions, and asked that "all sums presently held by any of the Defendants which

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[19] 47 U.S.C. § 202 provides, in pertinent part:

> (a) It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

[20] 47 U.S.C. § 206 provides:

> In case any common carrier shall do, or cause or permit to be done, any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter, together with a reasonable counsel or attorney's fee shall be taxed and collected as part of the costs in the case.

have been collected in connection with the playing of [LMAD] be deposited with the registry" of the court.

In sum, the plaintiffs prayed for actual damages, treble damages, punitive damages, declaratory relief, an order enjoining the defendants from continuing to advertise or operate LMAD, and costs and attorneys' fees.[21]

The district court certified a master class on Counts One through Three under Fed. R. Civ. P. 23(b)(3), consisting of

> [a]ll natural persons who have been billed for telephone calls originating from their households made to the 900-number "Let's Make a Deal" game and have not received cash prizes exceeding such charges.

The court also certified a Georgia subclass on the Georgia RICO claim (Count Four), consisting of

> [a]ll members of the class who have been charged for calls made from the State of Georgia to 900-860-4332 and/or other 900 prefix telephone numbers used to play "Let's Make a Deal."

After this court handed down its opinion in *Andrews*, AT&T moved the district court to decertify the master class on the federal RICO claim.[22] The district court denied the motion and AT&T appeals.

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[21] The prayer for injunctive relief became moot when the defendants ceased operating LMAD voluntarily.

[22] AT&T is the only defendant left in the case. As the district court stated in its order denying AT&T's motion to decertify the class, "Plaintiffs have . . . voluntarily dismissed their claims against Teleline,

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II.

A.

We have jurisdiction over this appeal pursuant to 28 U.S.C. § 1292(b), which provides for appeals from an order that involves "a controlling question of law as to which there is substantial ground for difference of opinion" if the immediate appeal from such order "may materially advance the ultimate termination of the litigation."[23] The district court certified its order denying class certification for interlocutory appeal, in accordance with the statute. We granted permission to appeal.

B.

We review the propriety of the district court's certification of a class for an abuse of discretion. *Rutstein v. Avis Rent-A-Car Sys., Inc.*, 211 F.3d 1228, 1233 (11th Cir. 2000). "A district court abuses its direction if . . . it applies the

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and they entered into a settlement agreement with USA Networks. Thus, AT&T is the sole remaining Defendant in this action."

[23] 28 U.S.C. § 1292(b) reads:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* that application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

wrong legal standard, *Delta Air Lines, Inc. v. ALPA, Int'l*, 238 F.3d 1300, 1308 (11th Cir. 2001), or makes findings of fact that are clearly erroneous, *In re Celotex Corp.*, 227 F.3d 1336, 1338 (11th Cir. 2000)." *United States v. Sigma Int'l, Inc.*, 244 F.3d 841, 851-52 (11th Cir. 2001). If "the district court properly exercised its discretion within the parameters of Rule 23, the court's determination should stand." *Andrews v. Am. Tel. & Tel. Co.*, 95 F.3d 1014, 1022 (11th Cir. 1996). If the court's certification was "erroneous as a matter of law," however, the court necessarily abused its discretion and the class should be decertified. *Jackson v. Motel 6 Multipurpose, Inc.*, 130 F.3d 999, 1006 (11th Cir. 1997) (citing *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405, 110 S. Ct. 2447, 2461, 110 L. Ed. 2d 359 (1990)).

III.

"A class action may be maintained only when it satisfies all the requirements of Fed. R. Civ. P. 23(a) and at least one of the alternative requirements of Rule 23(b)." *Jackson v. Motel 6 Multipurpose, Inc.*, 130 F.3d 999, 1005 (11th Cir. 1997). The district court certified the plaintiff class in this case pursuant to Rule 23(b)(3), which provides that a class may be maintained if "the questions of law or fact common to the members of the class predominate over any questions affecting only individual members" and if a class action is a "superior" method of adjudicating the controversy. We have made clear that Rule 23(b)(3) "imposes *two* additional requirements" for class certification – predominance and increased efficiency. *Jackson*, 130 F.3d at 1006. The plaintiffs had the burden of meeting the

requirements of Rule 23(a) and Rule 23(b)(3).[24] *See Rutstein v. Avis Rent-A-Car Sys., Inc.*, 211 F.3d 1228, 1233 (11th Cir. 2000).

A.

AT&T contests the district court's certification of the plaintiff class with respect to the federal RICO claims predicated on the mail and wire fraud statutes, 18 U.S.C. §§ 1341 and 1343. AT&T asserts that the "predominance" requirement of Rule 23(b)(3) is not satisfied and that the class is not manageable. The plaintiffs counter that the manageability issue "is one of practicality and not one of law." They assert that "[i]t cannot be error [for the district court] to hold that a case can be managed if the case, in fact, can be managed." And, they point out, the district court claimed in its certification order that "common issues predominate, that individual issues can be adequately managed, and that class treatment is a superior method of adjudication."

While we do not dispute that manageability is generally an issue of fact and practicality and not one of law, we cannot overlook the fact that the district court reached its conclusions on manageability based upon a faulty legal premise.

A violation of the mail or wire fraud statutes, 18 U.S.C. §§ 1341 and 1343,[25] requires proof that a person "(1)

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[24] AT&T does not assert that certification was improper according to Rule 23(a).

[25] The substantive elements of mail fraud and wire fraud are identical. *Beck v. Prupis*, 162 F.3d 1090, 1095 (11th Cir. 1998). "The only difference between the two offenses is their jurisdictional basis – mail

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fraud requires proof of the use of the mails, while wire fraud requires proof of the use of the wires." *Id.* at 1095 n.9.

The mail fraud statute reads:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

18 U.S.C. § 1341.

The wire fraud statute reads:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

18 U.S.C. § 1343.

intentionally participate[d] in a scheme to defraud another of money or property and (2) use[d] the mails or wires in furtherance of that scheme." *Pelletier v. Zweifel,* 921 F.2d 1465, 1498 (11th Cir. 1991). When a civil RICO claim is predicated upon mail or wire fraud, the plaintiff must additionally show that "he was injured by reason of the defendant's acts of deception." *Id.* at 1499; *see also* 18 U.S.C. § 1964(c) (providing civil remedies only to those persons who are injured "by reason of" racketeering activity). Thus, when a plaintiff brings a civil RICO case predicated upon mail or wire fraud, he must prove that he was "a target of the scheme to defraud" and that he "relied to his detriment on misrepresentations made in furtherance of that scheme." *Pelletier,* 921 F.2d at 1499-1500; *see also Andrews v. Am. Tel. & Tel. Co.,* 95 F.3d 1014, 1025 (11th Cir. 1996).

We can therefore summarize the elements of a civil RICO claim predicated upon mail or wire fraud as follows: The plaintiff has the burden of proving: (1) that the defendant intentionally participated, (2) in a scheme to defraud,[26] (3) the plaintiff of money or property, (4) by means of material misrepresentations,[27] (5) using the mails or wires, (6) and that the plaintiff relied on a misrepresentation made in furtherance of the fraudulent scheme, (7) that such misrepresentation would have been

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[26] "A 'scheme to defraud' involves the making of misrepresentations intended and reasonably calculated to deceive persons of ordinary prudence and comprehension." *Beck,* 162 F.3d at 1095.

[27] The Supreme Court recently clarified that materiality is an element of the offense of mail or wire fraud. *Neder v. United States,* 527 U.S. 1, 25, 119 S. Ct. 1827, 1841, 144 L. Ed. 2d 35 (1999) ("[W]e hold that the materiality of falsehood is an element of the federal mail fraud, wire fraud, and bank fraud statutes.").

relied upon by a reasonable person,[28] (8) that the plaintiff suffered injury as a result of such reliance,[29] and (9) that the plaintiff incurred a specifiable amount of damages.

1.

In its certification order, the district court properly recognized that "reliance is a necessary element of a civil RICO claim based on mail or wire fraud." The court disagreed "with AT&T's contentions regarding the necessity of conducting individual inquiries on this element." Instead, the court determined that "reliance may be virtually presumed" in this case.[30] This was error.

We were faced with an identical presumption in *Andrews*, 95 F.3d 1014, wherein the district court employed a "presumption" of reliance using language very similar to that in the instant case. In *Andrews*, we made clear that, even assuming that the plaintiffs could prove a scheme to defraud and misrepresentations in furtherance of that scheme, "the plaintiffs would still have to show, *on*

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[28] "[T]he plaintiff must prove that a reasonable person would have relied on the misrepresentations." *Beck*, 162 F.3d at 1095.

[29] In causing the plaintiff to suffer injury, the plaintiff must prove that the racketeering activity *caused* the injury. *Beck*, 162 F.3d at 1095-96 ("[T]he racketeering activity must be more than simply the 'but for' cause of the injury; it must also be the proximate cause.").

[30] In its order on AT&T's motion to decertify the class in light of *Andrews*, the court stated: "I previously concluded that the individual issues of reliance, injury, and damages do not preclude class certification in this case, and the panel majority's opinion in *Andrews* does not alter that conclusion." The court reiterated that "reliance could be virtually presumed under the facts of this case, as any caller who played the game and who was charged more than he or she won in prizes was necessarily injured 'by reason of' the game."

an individual basis, that they relied on the misrepresentations." *Id.* at 1025 (emphasis added).

The district court attempted to distinguish *Andrews* on the basis that the classes in that case "involved numerous different 900 number programs, whereas [the instant] case involves only the LMAD game." *Andrews* does not permit such a distinction.

In discussing the Andrews class, we stated that the "overarching common issue" was overshadowed by "an unmanageable variety of individual . . . issues." *Andrews,* 95 F.3d at 1023. In support of this conclusion, we said that the "mail and wire fraud allegations, for example, are not wholly subject to class-wide resolution." *Id.* at 1023-24. With respect to the Andrews class, our rejection of the district court's use of a presumption regarding reliance and damages[31] was our only comment pertaining to the mail and wire fraud allegations. (The other reasons we listed for decertifying the Andrews class related only to the gambling claim.)

With respect to the Harper class, *Andrews* noted first that the 900-number programs at issue differed widely, such that "each program must be assessed individually to determine whether fraudulent tactics were employed by

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[31] For the reliance presumption, *Andrews* cited *Pelletier,* 921 F.2d at 1499-1500, for the proposition that "each plaintiff must demonstrate reliance on deceptive conduct in furtherance of the alleged RICO scheme." *Andrews,* 95 F.3d at 1024. With respect to damages, *Andrews* cited *Alabama v. Blue Bird Body Co.,* 573 F.2d 309, 328-29 (5th Cir. 1978), for the proposition that a court should have " 'serious reservations about the manageability of a class' when all damage questions cannot be handled by one forum." *Andrews* 95 F.3d at 1024; *see also infra* Part III.A.2.b.

the appellants." *Id.* at 1025. This statement shows that the diversity of the 900-number programs was probably sufficient grounds, on its own, for decertification. The next paragraph of the opinion, though, contained an alternate holding. Therein, we assumed that the plaintiffs could overcome the hurdle of individually assessing each program to determine whether the appellants used fraudulent tactics but noted that the plaintiffs would nonetheless have to show on an individual basis that they relied, suffered injury, and incurred damages. *Id.*

Thus, with respect to *both* classes in *Andrews,* we rejected the propriety of allowing a presumption that would relieve plaintiffs of their burden of having to prove every element of a claim. Because we rejected a presumption of reliance in *Andrews,* we must do the same in this case.

The function of presumptions supports the conclusion of *Andrews.* A presumption is generally employed to benefit a party who does not have control of the evidence on an issue. A presumption places a burden of production on the party against whom it is directed; this party must present evidence sufficient "to rebut or meet the presumption, but [the presumption] does not shift to such party the burden of proof." Fed. R. Evid. 301. In the case at hand, AT&T has no evidence regarding whether the plaintiffs "relied" upon misrepresentations. The plaintiffs themselves are in control of this information. It would be unjust to employ a presumption to relieve a party of its burden of production when that party has all the evidence regarding that element of the claim.

The plaintiffs urge us to follow cases in which they say reliance was "presumed."[32] The cases upon which plaintiffs rely, however, address "fraud-on-the-market" claims.[33] *See* 17 C.F.R. § 240.10b-5 ("Rule 10b-5").[34] This is an

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[32] Other than the cases cited in the text and notes *infra*, the plaintiffs cite *Eisenberg v. Gagnon*, 766 F.2d 770 (3d Cir. 1985); *Peterson v. H & R Block Tax Servs., Inc.*, 174 F.R.D. 78 (N.D. Ill. 1997); *Smith v. MCI Telecommunications Corp.*, 124 F.R.D. 665 (D. Kan. 1989); *Davis v. S. Bell Tel. & Tel. Co.*, 1993-2 Trade Cas. (CCH) ¶ 70,480 (S.D. Fla. 1993); *Bryan v. Amrep Corp.*, 429 F.Supp. 313 (S.D.N.Y. 1977); *Cope v. Metro. Life Ins. Co.*, 696 N.E.2d 1001 (Ohio 1998); *Amato v. General Motors Corp.*, 463 N.E.2d 625 (Ohio Ct. App. 1982); *Weinberg v. Hertz Corp.*, 499 N.Y.S.2d 693 (N.Y. App. Div. 1986); *Occidental Land, Inc. v. Superior Court of Orange County*, 134 Cal. Rptr. 388 (Cal. 1976); *Vasquez v. Superior Court of San Joaquin County*, 94 Cal.Rptr. 796 (Cal. 1971).

The plaintiffs also cite a host of cases for the proposition that "[r]eliance upon a fraud may be proved by circumstantial evidence." We do not say herein that reliance must be proved by direct (as opposed to circumstantial) evidence. We merely hold that reliance may not be *presumed* such that a plaintiff does not have to come forward and prove an element of the claim.

[33] To the extent that the plaintiffs cite us to cases that do not address a securities market context, we find these cases unpersuasive.

[34] Rule 10b-5 reads:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
>
> (a) To employ any device, scheme, or artifice to defraud,
>
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

17 C.F.R. § 240.10b-5.

important distinction, for, as the Supreme Court has stated:

> The fraud on the market theory is based on the hypothesis that, in an open and developed securities market, the price of a company's stock is determined by the available material information regarding the company and its business .... Misleading statements will therefore defraud purchasers of stock even if the purchasers do not directly rely on the statements.

Basic, Inc. v. Levinson, 485 U.S. 224, 241-42, 108 S.Ct. 978, 989, 99 L.Ed.2d 194 (1988) (quoting *Peil v. Speiser,* 806 F.2d 1154, 1160-61 (3d Cir. 1986)).[35] The Court's reason for employing a presumption of reliance in *Basic* rested upon the very nature of the market itself and the price as set by the market.

> An investor who buys or sells stock at the price set by the market does so in reliance on the integrity of that price. Because most publicly available information is reflected in market price, an investor's reliance on any public material misrepresentations, therefore, may be presumed for purposes of a Rule 10b-5 action.

Id. at 247, 108 S.Ct. at 992.

Our circuit has adopted the theory that the unique nature of the public securities market distinguishes fraud on the market from other claims of garden-variety fraud.

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[35] The Court, in employing the presumption, emphasized that the defendant could rebut the presumption by making "[a]ny showing that sever[ed] the link between the alleged misrepresentation and either the price received (or paid) by the plaintiff, or his decision to trade at a fair market price." *Basic,* 485 U.S. at 248, 108 S.Ct. at 992.

Our case law refers to this unique nature of the public securities market as the "integrity of the market." *Kirkpatrick v. J.C. Bradford & Co.*, 827 F.2d 718, 722 (11th Cir. 1987); *Shores v. Sklar*, 647 F.2d 462, 469 (5th Cir. May 1981) (en banc) (holding that reliance may be established by proof that securities not traded on the open market could not have been issued at all but for a fraudulent scheme of the defendants; the plaintiff still had to prove that he "relied on the integrity of the offerings of the securities market"). While *Kirkpatrick* stated that the fraud-on-the-market theory did not preclude class treatment when the purchasers of a security "might have relied on factors other than the integrity of the market," 827 F.2d at 723, it clarified that the fact that the plaintiffs "may have obtained the allegedly misleading information via their individual brokers" did not preclude class treatment, *id.* at 724. In other words, *Kirkpatrick* simply held that, in the fraud-on-the-market context, class treatment was not precluded just because some plaintiffs may have relied upon a person who owed the plaintiff a fiduciary duty rather than relying upon the integrity of the market itself.[36]

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[36] *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 92 S. Ct. 1456, 31 L. Ed. 2d 741 (1972), does not require a result different from the conclusion we reach in the text. *Affiliated Ute* held that, in a securities case, reliance was not a "prerequisite to recovery"; a plaintiff need only show that the defendant omitted facts that were material, "in the sense that a reasonable *investor* might have considered them important in the making of this decision." *Id.* at 153-54, 92 S. Ct. at 1472 (emphasis added); *see also Basic*, 485 U.S. at 245, 108 S. Ct. at 990 ("Requiring a plaintiff to show a speculative state of facts, *i.e.*, how he would have acted if omitted material information had been disclosed, or if the misrepresentation had not been made, would place an unnecessarily unrealistic evidentiary burden on *the Rule 10b-5 plaintiff* who

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The securities market presents a wholly different context than a consumer fraud case, and neither this circuit nor the Supreme Court has extended a presumption of reliance outside the context of securities cases. The "integrity of the market" is not at issue in this case, and AT&T did not owe these plaintiffs a fiduciary duty in the way that a broker may owe his client a fiduciary duty. Because the fraud-on-the-market cases are not on point, we are bound to follow *Andrews* and *Pelletier*. *See Cargill v. Turpin*, 120 F.3d 1366, 1386 (11th Cir. 1997) (holding that a prior panel decision is binding on subsequent panels).

2.

In addition to presuming the reliance element, the district court determined – as part of the "scheme to defraud" – that "[LMAD] and its promotions appear to have been fundamentally unchanged and without material variation from the game's inception." The court further determined that "the few individualized inquiries which might be necessary on the issue of damages or individual claims cannot be said to predominate over the common issues here." We cannot agree with the court on either proposition.

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has traded on *an impersonal market*.") (emphasis added) (internal citations omitted).

a.

With regard to the scheme to defraud, the district court erroneously determined that LMAD and itspromotions were "without material variation." The plaintiffs bear the burden of proving that the advertisement(s) upon which *each class member relied* was fraudulent and misleading. *See Beck v. Prupis,* 162 F.3d 1090, 1097 (11th Cir. 1998) (disallowing a civil RICO claim predicated on mail and wire fraud where the plaintiff failed to present any evidence "that he actually saw, let alone relied upon" any false statements). In this case, over 119 different commercials were broadcast on the U.S.A. Network alone. The advertising for LMAD included thirty-second commercials, two-minute commercials, thirty-minute "infomercials," print advertising (in the National Enquirer, newspapers, and local publications), and direct mail solicitations. The record indicates that few of these advertisements are still in existence,[37] that LMAD did not retain copies of all of the advertising, that LMAD did not send copies of all of its advertising to AT&T prior to its use (despite a contractual obligation to do so), and that even the advertisements that remain in existence vary considerably in terms of content and language. The plaintiffs' own expert has conceded that those advertisements that are still available "vary in terms of their potential to deceive."[38]

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[37] For example, only 12 of the 119 commercials on the U.S.A. Network have been produced in connection with this litigation.

[38] The plaintiffs' expert further testified that "some of the people that saw the ads could have called and understood a lot about [LMAD]; but I'm thinking that most of them, the large majority of them, were deceived." The expert also conceded that he would be unable to know

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The upshot of this is that each individual plaintiff is the only person with information about the content of the advertisement upon which he relied. Of course, a fact-finder cannot determine whether an advertisement was misleading or fraudulent without knowing its content, and so each plaintiff will have to provide evidence of the particular advertisement(s) that he heard or saw. The court may not employ a presumption that all of the LMAD advertisements were misleading, because each individual plaintiff bears the burden of proving that the ad upon which he relied was misleading. Use of a presumption is improper because each individual plaintiff may be the only person with critical information about the content of the ad upon which he relied; this content is evidence necessary to determine whether the ad was misleading or fraudulent. Individual issues will therefore predominate over common issues.

b.

The district court employed a presumption on the plaintiffs' behalf on the issues of injury and damages, deciding to forgo an individualized inquiry on these elements of the plaintiffs' claims. The court did so despite the fact that applying the presumption would provide recovery to some persons who had not proved that they were injured as a result of LMAD, and, in some instances, would provide recovery in excess of the damages incurred by a class member. The court's rationale was that "such refunds would not significantly harm AT&T":

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which particular consumer would or would not be deceived by a particular ad.

> Although Local Exchange Carriers (LECs) with whom AT&T contracted to collect the 900-number charges may have kept poor records in refunding money for some calls, also affecting the damages issue, such amounts may be insubstantial compared to the overall harm to the Plaintiffs' class. Besides, to the extent that some percentage of class members might receive a double recovery because the LECs have already given certain refunds for which no records were kept, such refunds would not significantly harm AT&T.

Although we could debate whether AT&T would be "significantly harm[ed]" by paying, in treble damages, money already recovered by a consumer,[39] we need not do so now, for the harm to AT&T is not relevant to the question of whether the plaintiffs' injuries and damages should be presumed.

A plaintiff suing under civil RICO must demonstrate injury as a result of racketeering activity and a specifiable amount of damages. *See Andrews,* 95 F.3d at 1025 (stating that class members must show, "on an individual basis, that they relied on the misrepresentations, suffered injury as a result, and incurred a demonstrable amount of damages"). To allow recovery by persons who have not been injured or to allow recovery for an injury greater than that caused by the offending conduct would run counter to the plain language of the statute. 18 U.S.C. § 1964(c) ("Any person *injured* . . . shall recover threefold *the damages he* sustains . . . .") (emphasis added); *see also*

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[39] AT&T has presented evidence to the effect that, at one point in 1992, about 40% of the calls made to LMAD either were not paid or were credited by AT&T and the local exchange carriers.

Sedima, S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479, 497, 105 S. Ct. 3275, 3285, 87 L. Ed. 2d 346 (1985) (stating that a civil RICO defendant is not "'liable to those who have not been injured'") (quoting *Haroco, Inc. v. Am. Nat'l Bank & Trust Co.*, 747 F.2d 384, 398 (7th Cir. 1984)). We reiterate that class treatment may not serve to lessen the plaintiffs' burden of proof.[40]

In this case, a list of all of the individuals who received a refund or credit or who refused to pay cannot be created from the records of AT&T, the local exchange carriers, or Teleline. As we have stated above, a presumption should be employed only on behalf of a party who *does not* have control of the evidence on an issue. Each plaintiff in this case received telephone bills, and each plaintiff who suffered injury by paying for calls to LMAD would have access to a payment record, which would detail the amount paid (thereby establishing the amount of damages). A court may not employ a presumption on behalf of a party who has such evidence at his disposal.

These claims will involve extensive individualized inquiries on the issues of injury and damages – so much so that a class action is not sustainable. The district court presumably recognized this or it would not have employed a presumption on these issues to avoid having to decertify the class. We cannot condone the use of a presumption as a "shortcut" in resolving issues of injury and damages where such elements are provable by the plaintiffs and are required for recovery. *See Broussard v. Meineke Disc.*

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[40] This is not to say that it would be impossible to certify any class because of damages problems. In cases involving damages that may be calculated by a reliable formula – such as overcharge cases or usury cases – damages are not much of a hurdle at all to certification.

Muffler Shops, Inc., 155 F.3d 331, 343 (4th Cir. 1998) (noting that the fact that a "shortcut was necessary in order for this suit to proceed as a class action should have been a caution signal to the district court that class-wide proof of damages was impermissible").

B.

AT&T also contests the propriety of the district court's certification of a class with respect to the federal RICO claims predicated on illegal gambling,[41] in violation of 18

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[41] It is quite rare for a plaintiff to bring a civil RICO claim predicated upon illegal gambling. We have been unable to locate any such claims in the prior decisions of this court, and scarcely any in other circuits (although there are a few published district court cases). One possible reason for this, which we do not address in this opinion, is that it would be quite curious for a plaintiff to institute a RICO claim predicated on illegal gambling against a defendant, for the plaintiff would have to therein admit that he violated the gambling laws of a state. This is because while 18 U.S.C. § 1955 only applies to persons in charge of a gambling business with more than five persons, *see infra* note 42, one of the requirements for satisfying section 1955 is that the gambling business be "a violation of the law of the State or political subdivision in which it is conducted." This means that to prove his RICO claim, the plaintiff would have to show that the defendant violated the law of a state in which the gambling occurred. But since it takes two parties to gamble, plaintiffs would thus be proving that they participated in conduct that violated state law. (We recognize that there may be exceptions to this situation, such as in the instant case, wherein the plaintiffs allege that they were unwitting participants in illegal gambling; such plaintiffs would likely lack the requisite *mens rea* for prosecution under state law.) We do not pass on the issue, but we posit the possibility that the plaintiffs may be barred from bringing such a claim by the "unclean hands" doctrine.

U.S.C. § 1955.[42] In a criminal prosecution instituted under section 1955, the government must prove three elements:

> first, the enterprise violates state law; second, the illegal gambling business involves five or more persons who conduct, finance, manage, supervise, direct or own all or part of such business; and third, the business was either in substantially continuous operation for a period in excess of thirty (30) days *or* had a gross revenue of $2,000.00 in a single day.

United States v. 18755 N. Bay Rd., 13 F.3d 1493, 1496 (11th Cir. 1994). When a civil RICO plaintiff attempts to base a RICO claim on illegal gambling, the plaintiff must prove these same elements. Additionally, the plaintiff must

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[42] Section 1955 provides, in pertinent part:

(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined under this title or imprisoned not more than five years, or both.

(b) As used in this section –

(1) "illegal gambling business" means a gambling business which –

(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

(2) "gambling" includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein.

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

prove that he was "injured in his business or property by reason of" the illegal gambling. 18 U.S.C. § 1964(c); *see also Price v. Pinnacle Brands, Inc.*, 138 F.3d 602, 607 (5th Cir. 1998) (holding that the plaintiffs did not have standing to bring a civil RICO claim predicated on illegal gambling because they failed to allege "a compensable injury"). Thus, just as the plaintiffs must prove injury and damages when predicating their RICO claim on mail and wire fraud, *see Pelletier*, 921 F.2d at 1499-1500, so too must they prove injury and damages when predicating their RICO claim upon illegal gambling.[43]

We have previously discussed, in Part III.A.2.b *supra*, the plaintiffs' difficulties in showing injury and damages as a class. These difficulties apply equally whether the predicate act is mail and wire fraud or illegal gambling.

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[43] There is also no reason to differentiate the plaintiffs' federal RICO claim arising from the defendant's alleged collection of unlawful debt. The plaintiffs still must prove injury and damages, and the same difficulties arise with respect to unlawful debt collection as to claims of a "pattern of racketeering activity" predicated on mail or wire fraud or on illegal gambling. Further, the allegation that AT&T violated federal RICO by collecting unlawful debt would also turn on plaintiffs' establishing that debts incurred by participation in LMAD were "gambling debts." This raises the specter of applying the laws of fifty states, as described *infra* note 44.

18 U.S.C. § 1961(6) defines "unlawful debt":

> "[U]nlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate.

Thus, the class must be decertified on the illegal gambling claim because individual issues will overwhelm any common issues.[44]

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[44] The parties devote much attention in their briefs to whether the district court would have to apply the laws of all fifty states, or the laws of only four states, in resolving the illegal gambling claims. (The plaintiffs contend that the court need apply only the laws of California (where Teleline's home office was located), Illinois (where some calls were answered and a relevant AT&T facility was located), New Jersey (where a relevant AT&T office was located), and Missouri (where most of the calls were answered).) The district court unequivocally ruled that the gambling laws of all fifty states would have to be applied: "In order to eliminate any confusion, I now conclude that the laws of each state from which a call was made . . . will be used to evaluate the gambling claims in this litigation." Appellant AT&T agrees with the district court's determination on choice of law; its only contention is that applying the laws of all fifty states is not "manageable" under Rule 23(b)(3). Plaintiffs contend that the laws of four states, at most, apply to these claims. The plaintiffs, however, have not cross-appealed the district court's determination on this issue. The plaintiff's failure to file a cross-appeal violates the requirement of Fed. R. App. P. 5(b)(2) and means that the plaintiffs have not preserved this issue for appeal. *See United States v. Am. Ry. Express Co.*, 265 U.S. 425, 435, 44 S. Ct. 560, 564, 68 L. Ed. 1087 (1924) ("[T]he appellee may not attack the decree [of the district court] with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary" unless the appellee cross-appeals.); *Tranello v. Frey*, 962 F.2d 244, 248 (2d Cir. 1992) (holding that the failure to file a petition for cross-appeal within the statutory time limit is a jurisdictional defect that bars the court from hearing the cross-appeal); *Freeman v. B&B Assocs.*, 790 F.2d 145, 151 (D.C. Cir. 1986) (holding that failure of an appellee to cross-appeal "ordinarily precludes review where an appellee seeks to enlarge his rights or lessen those of an adversary," but is not a jurisdictional bar); *see also Harbor Tug & Barge, Inc. v. Belcher Towing Co.*, 733 F.2d 823, 825 n.1 (11th Cir. 1984); *Campbell v. Wainwright*, 726 F.2d 702, 704 (11th Cir. 1984). Assuming that the district court was correct in ruling that the laws of all fifty states apply, that alone would render the class unmanageable. *See Andrews*, 95 F.3d at 1024; *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 741-43 and n.15 (5th Cir. 1996); *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1300-01 (7th Cir. 1995).

IV.

In sum, the district court abused its discretion in certifying the plaintiff class by erroneously determining that common issues of law or fact would predominate over individual issues. We therefore REVERSE the certification order and REMAND for further proceedings consistent with this opinion.

SO ORDERED.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA STATESBORO DIVISION

JAMES W. SIKES, and FELIX KEMP, Individually and on Behalf of All Other Persons Similarly Situated,	*	
Plaintiffs,	*	No. CV 692-147
vs.	*	
AMERICAN TELEPHONE AND TELEGRAPH COMPANY and USA NETWORKS,	*	
Defendants.	*	

ORDER
(Filed May 13, 1994)

Before the Court in the above-captioned case is Plaintiffs' Motion for Class Certification. Plaintiffs have brought this action on behalf of all persons who have been billed for telephone calls originating from their households made to the 909-number "Let's Make A Deal" game and have not received cash prizes exceeding such charges.

Plaintiffs allege that the Let's Make A Deal game involved, *inter alia*, acts of unlawful gambling, mail fraud, and wire fraud in violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO") (18 U.S.C. § 1961, et seq.), the Communications Act of 1934 (47 U.S.C. § 151 et seq.), the Georgia Racketeer Influenced Corrupt Organizations Act ("Georgia RICO") (O.C.G.A. § 16-14-1, et seq.), and other state laws. Plaintiffs now seek class

certification on these claims pursuant to Rule 23, Fed. R. Civ. P.

The Court provisionally certified a class for the purpose of granting preliminary injunctive relief in December of 1992. Defendant Teleline was voluntarily dismissed from the case and the dismissal was approved by Order of April 22, 1993. Defendant USA Networks has entered into a settlement agreement with the named Plaintiffs conditioned upon the Court's approval. A full hearing on the question of permanent class certification was held before the Court on May 3, 1994, wherein the named Plaintiffs presented evidence in support of class certification and Defendant American Telephone & Telegraph Company ("AT&T") presented evidence in opposition to class certification. Defendant USA Networks offered no evidence at the hearing.

I. Requirements of Rule 23

The requirements for class certification are set forth in Rule 23, Fed. R. Civ. P. Rule 23(a) establishes the prerequisites for a class action, specifically allowing a representative class member to bring an action on behalf of all only if

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Rule 23(a), Fed. R. Civ. P. These four elements are commonly abbreviated as numerosity, commonality, typicality,

and adequacy of representation; each element will be addressed in more detail below.

In addition to the four prerequisites just discussed, a class action may not be maintained unless at least one of the subsections of Rule 23(b) is satisfied. The subsection of 23(b) most pertinent to the present case is 23(b)(3)[1] Rule 23(b)(3) states that

> [a]n action may be maintained as a class action if . . . the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

Rule 23(b)(3), Fed. R. Civ. P. This section also provides several factors pertinent to the findings of whether individual or common issues predominate.

Whether class certification lies under Rule 23 is a matter left to the considered discretion of the district court. *Gilchrist v. Bolger*, 89 F.R.D. 402, 404 (S.D. Ga. 1981), *vacated in part on other grounds*, 733 F.2d 1551 (11th Cir. 1984). The proponent of the class bears the

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[1] Rule 23(b)(1) and (b)(2) are more appropriately applied to cases seeking injunctive or declaratory relief. *See Wilcox Development Co. v. First Interstate Bank, N.A.*, 97 F.R.D. 440, 444 (D. Or. 1983); *In Re Dennis Greenman Securities Litigation*, 829 F.2d 1539 (11th Cir. 1987).

Since, in the present case, the claims for injunctive relief are moot, and since each class member's individual claim is so small that there is little chance of other suits or inconsistent adjudications absent class certification, I will only examine Plaintiffs' motion under Rule 23(b)(3).

burden of proof on the propriety of class certification. *Jones v. Diamond*, 519 F.2d 1090 (5th Cir. 1975).[2]

II. Class Certification in the Present Case

Having considered the arguments of counsel, the Court concludes that all Rule 23 class action requirements are met in this case. The requirements will be addressed *seriatim*.

A. Rule 23(a):

1. Numerosity

The requirement of numerosity is not contested in the present case. The national class as proposed may consist of more than 800,000 persons. Joinder of this many plaintiffs is unquestionably impracticable.

2. Commonality

Clearly, there are questions of law and fact in common among the members of the proposed class. Issues regarding the creation and operation of the game, the terms of the billing services agreement and of Defendant AT&T's 900-number guidelines, and the Defendants' knowledge in participating in the operation of the game are among the many common factual issues to be determined in this case. Issues regarding the applicability of the federal RICO and Communications Act statutes are among the many common

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[2] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all of the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

legal issues to be determined. Defendant AT&T does not so much dispute commonality as it disputes whether those common issues are outweighed by individual issues. The few individual issues, such as damages or claims, are virtually inconsequential when compared to the common issues.

3. Typicality

The claims of the named representatives need not be identical to the claims of the proposed class members, but rather need only be typical of those claims. *See Eisenberg v. Gagnon*, 766 F.2d 770, 786 (3d Cir. 1985). The inquiry is whether the class representatives themselves present those common issues of law and fact that justify class treatment, thereby tending to insure that the absent class members will be adequately represented. *Id.* If a defendant's course of conduct which forms the basis of a plaintiff's claim relates to the class generally, the plaintiff's claim is considered typical. *General Telephone Co. v. Falcon*, 457 U.S. 147, 158 n.15 (1982).

Since the "Let's Make A Deal" game likely enticed the most gullible members of a household to play, and apparently had no enforcement on its purported age restriction,[3] the typical claim might well be that of a head-of-household responsible for payment of a family's monthly phone bill, including calls made by a minor child or grandchild. As such, the claims of Plaintiffs Kemp and Sikes might

[3] Although Defendants purportedly limited the game to callers over eighteen years of age, the Defendants apparently did not program their interactive answering devices to terminate the game when, for example, a caller entered "10" when prompted to enter his age.

closely resemble those of many of the proposed class members. Regardless, the claims of the named Plaintiffs clearly arose from the same course of conduct as did the claims of the other proposed class members sufficient to satisfy the typicality requirement herein.

4. Adequacy of Representation

As evidenced from testimony at the certification hearing, the named Plaintiffs clearly have some knowledge of the case, have pursued it vigorously and plan to continue doing so, and are willing to travel some distance to attend court proceedings.

Moreover, when considering adequacy of class representation the closer focus of the inquiry is whether plaintiffs' counsel are qualified, experienced, and generally able to conduct the proposed litigation, and whether plaintiff has interests antagonistic to those of the class. *Griffin v. Carlin*, 755 F.2d 1516, 1533 (11th Cir. 1985). Plaintiffs' counsel are experienced and well-prepared to litigate this action, and the named Plaintiffs do not appear to have interests antagonistic to those of the class.

B. Rule 23(b):

Under Rule 23(b), a class action is maintainable if common questions of law or fact predominate over any questions affecting only individual members and if the Court finds the class action to be superior to other methods for the fair and efficient adjudication of the controversy.

In opposing class certification, AT&T argues that individual issues predominate over common questions and

that class treatment is an inferior method of adjudicating this dispute. In particular, AT&T argues that Plaintiffs' claims of mail fraud and wire fraud will require an examination of each Let's Make A Deal promotion, the extent of AT&T knowledge of each promotion, and the extent of each class member's reliance on the allegedly unlawful advertisements. AT&T also argues that Plaintiffs' claims of unlawful gambling require an inquiry into the gambling laws of most of the states in the country and that Plaintiffs' Communications Act, Georgia RICO, and contractual claims all likewise involve individual inquiries.

I find that the common issues predominate over any individual issues in this action. AT&T claims, for example, that the game and promotional materials for the game (some of which are unavailable for review) may have differed substantially over time. Game creator and Teleline President Robert Lorsch has said, however, that "the game remained the same from inception" without any "fundamental" changes (Lorsch Dep., Aug. 29, 1993, pp. 354-56), and that "there was no difference" in the fundamental advertising message used for the game over time (*id.*, pp. 357-58). From the many versions of the promotions which I have viewed in these proceedings, I agree with Mr. Lorsch's determination. For the purpose of class certification, I find the game and its advertisements to have been fundamentally the same over time. Slight variations in the game and its promotion are insufficiently material to predominate over the common issues herein.

AT&T also contends that establishing callers' reliance on the game will require an individual inquiry into each class member's personal circumstances. Although reliance is a necessary element of a civil RICO claim based on mail or wire fraud, *see Pelletier v. Zweifel*, 921 F.2d 1465, 1499-

1500 (11th Cir. 1991), I disagree with AT&T's contentions regarding the necessity of conducting individual inquiries on this element.

To establish the element of reliance necessary for a claim of mail or wire fraud, a person need only show that "he was the target of the scheme to defraud and . . . relied to his detriment on misrepresentations made in furtherance of that scheme." *Id.* A plaintiff in a civil RICO action must show, in other words, that he was injured "by reason of" racketeering activity. *Id.* at 1499; *see* 18 U.S.C. § 1964(c).

Under the present facts, such reliance may be virtually presumed. There is evidence available showing the amount billed to each class member. If the game is found to involve fraudulent misrepresentations – which I do not decide herein – and if a caller played the game and was charged more than he or she won in prizes, then the person was injured by reason of the game. The 900-numbers are not listed in any public telephone directory and are not otherwise in general circulation, so it may be reasonably assumed that the caller learned of the game and decided to play, at least in part, from the game's promotional materials or from another person who learned of the game through those promotional materials. Reliance need not necessarily be an individualized inquiry.

As discussed *supra*, the game and its promotions appear to have been fundamentally unchanged and without material variation from the game's inception. The calls were also answered by an automated interactive telephone system. This automated system involved no human-to-human contact or potentially divergent oral

communications that might have made the representations and the reliance thereupon a more individualized inquiry. Under the present facts, the reliance element of Plaintiffs' fraud claims does not preclude class treatment.

Defendant AT&T also contends that it had differing degrees of "knowledge" of some of the versions of the game and the advertisements. Although I make no finding herein regarding AT&T's knowledge throughout the operation of Let's Make A Deal, it is sufficiently clear for the purposes of the present Motion that AT&T knew the fundamental concept of the game and allowed presale "release" of some versions of the game and its advertising. It owned, operated, and appears to have played at least some role in programming the interactive machines which took the calls. AT&T also employed people to call the game, listen to the messages, and report to management on the game's compliance with AT&T guidelines. To be sure, AT&T had every access to the game and its promotion. To the extent that AT&T's knowledge about different versions of the game or the game's promotional materials is disputed, such questions of knowledge are predominantly common. Such "common" issues are the real and important questions in the case.

Also, although Plaintiffs' RICO claims based upon theories of unlawful gambling might involve inquiries into various state gambling laws, I find that such inquiries themselves would share many common questions and that these inquiries would not predominate over the many other common questions in this case.

Finally, the few individualized inquiries which might be necessary on the issue of damages or individual claims cannot be said to predominate over the common issues

here. Computer programs similar to that demonstrated in proceedings before the Court, for example, can help automate and simplify some of the damage calculations.

Although Local Exchange Carriers (LECs) with whom AT&T contracted to collect the 900-number charges may have kept poor records in refunding money for some calls, also affecting the damages issue, such amounts may be insubstantial compared to the overall harm to the Plaintiffs' class. Besides, to the extent that some percentage of class members might receive a double recovery because the LECs have already given certain refunds for which no records were kept, such refunds would not significantly harm AT&T. What harm might be suffered would likely pale in comparison to the benefits AT&T enjoyed from the game's collections (about one-third). It would be unjust to effectively deny a class of individuals an opportunity to assert their claims merely because the record-keeping of the defendants or their business associates did not anticipate eventual turbulence in the 900-number market.

To the extent that individual inquiries on certain issues become necessary, those issues can be addressed through means other than maintaining over 800,000 individual lawsuits throughout the country. In addition to use of computer programs to help mechanize the damage computations, special masters might be used for the more ministerial portions of class management. The Court could also modify this certification Order pursuant to Rules 23(c)(1) and 23(c)(4), Fed. R. Civ. P., employing subclasses or invoking class treatment on certain issues only should such modifications become necessary.

At this point, I am satisfied that common issues predominate, that individual issues can be adequately

managed, and that class treatment is a superior method of adjudication (if not the only feasible method of adjudication, given the small size of each member's claims). There is no indication that individual members of the class have any strong interest in controlling the prosecution of these claims, that other litigation on these claims is ongoing, or that it is undesirable to concentrate the litigation in this forum. *See* Rule 23(b)(3), Fed, F. Civ. P. Manageability is not an insurmountable problem, and hearing these claims as a single action will promote judicial economy.

Plaintiffs' Motion for Class Certification is **GRANTED**. The class shall be defined as follows:

> All natural persons who have been billed for telephone calls originating from their households made to the 900-number "Let's Make A Deal" game and have not received cash prizes exceeding such charges.

The class is certified as to Counts I, II, and III of Plaintiffs' Amended Complaint.

Since Plaintiff's Amended Complaint also contains claims peculiar to Georgia law, including Count IV (under Georgia RICO), I also hereby certify a Georgia subclass as to Count IV consisting of:

> All members of the class who have been charged for calls made from the State of Georgia to 900-860-4332 and/or other 900 prefix telephone numbers used to play "Let's Make A Deal."

My findings above as to the common elements of reliance, etc., apply equally to the Georgia RICO claims as to the nation-wide claims. *Compare Bohannon v. Allstate Ins Co.*, 118 F.R.D. 151 (S.D. Ga. 1986).

Since Plaintiffs' claim for injunctive relief is now moot, I decline to certify the class as to Count V of Plaintiffs' Amended Complaint.

III. Notice

Rule 23(c)(2), Fed. R. Civ. P., requires that "the best notice practicable under the circumstances" be given in any class action maintained under subdivision (b)(3) of Rule 23. Although the telephone number of each caller is available in the present case, the names and addresses of the individuals having such phone numbers for the years in question are not reasonably ascertainable. Evidence presented in these proceedings indicates that a very significant percentage of the proposed class members have likely moved and changed telephones number since Let's Make A Deal was in operation. Locating those persons several years after the game was terminated would require more than reasonable effort under these circumstances.

In addition, sending individual notice to the names and addresses previously or currently associated with each telephone number would not likely reach a significantly higher number of class members than would an aggressive effort of publication notice. In the present case it is impracticable to require individual notice to be given to each class member.

Under these circumstances, the best notice practicable will be notice by publication. Notice will, therefore, be given to the class by publication in various forms. The parties are invited to submit their views on the type and

content of the publication notice to be given; these submissions should be received by the close of business on June 3, 1994.

The initial budget for class notification will be four hundred fifty thousand dollars ($450,000.00) to be paid into the registry of the Court. Initially, one-half of that amount will be paid by the Plaintiffs as a charge against their settlement with Defendant USA Networks, and the other one-half shall be paid by Defendant AT&T. The ultimate determination of which party shall bear these costs shall be made at a later time.

The Plaintiffs shall pay the sum of $225,000.00 into the registry of the Court as soon as is practicable. The sum of $225,000.00 shall be paid into the registry of the Court by Defendant AT&T by the close of business on June 3, 1994.

The case shall proceed to trial. I decline to certify this Order for interlocutory appeal.

ORDER ENTERED at Augusta, Georgia, this 13th day of May, 1994.

/s/ Dudley H. Bowen, Jr.
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA STATESBORO DIVISION

JAMES W. SIKES and FELIX KEMP, Individually and on Behalf of All Other Persons Similarly Situated, Plaintiffs, vs. AMERICAN TELEPHONE & TELEGRAPH COMPANY, Defendant.	* * * * * * * * * * * *	No. CV 692-147

ORDER

(Filed Mar. 26, 1998)

Several matters are pending before the Court in the above-captioned case. (1) Plaintiffs' Motion for Partial Summary Judgment; (2) Defendant's "Objections and Request to Strike Plaintiffs' Unsupported Factual Contentions and Inadmissible Evidence" (Request to Strike);[1] (3) Defendant's Cross-Motion for Partial Summary Judgment; and (4) Defendant's Motion to Decertify Class. For the reasons stated below, Defendant's Motion to Decertify

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[1] Defendant's Request to Strike was not filed and docketed as a separate motion, but rather was included in Defendant's Response to Plaintiffs' Statement of Undisputed Material Facts and Conclusions of Law.

Class is **DENIED**, and both parties' summary judgment motions are **DENIED**. Defendant's Request to Strike is **DENIED** as moot.

I. BACKGROUND

Plaintiff James Sikes is the parent of a young child who repeatedly called the 900-number "Let's Make A Deal" (LMAD) game, incurring charges in excess of $500.00 through approximately forty-eight calls on his parents' phone bill. Plaintiff Felix Kemp's grandson also placed a number of calls (for which the Kemps paid) to the LMAD game. This automated interactive telephone game was modeled on the television game show of the same name. The game had up to six levels, and at each level the caller could win a prize by selecting the correct "door" behind which the prize was concealed. Upon winning a prize, the caller could either accept that prize or advance to the next level. If the caller chose to advance, any previously awarded prize was forfeited in exchange for a chance at a larger prize. Plaintiffs claim that the odds of ultimately winning the maximum $2,000.00 cash prize were 1 in 2,700.

Plaintiffs contend that callers were enticed to play the LMAD game in various ways, including television commercials that featured Santa Claus and/or game-show host Monty Hall. These celebrities announced that they were "giving away $2,000.00 in cash instantly" but did not disclose the slim chances of actually winning that prize. When a call was placed to one of the applicable 900 numbers, the call was answered by a computer answering

device. Callers were charged various rates for these calls,[2] and Plaintiffs allege that the LMAD game was structured in order to prolong each call.

The LMAD game was created by Teleline, Inc., of Beverly Hills, California. Defendant American Telephone and Telegraph Company (AT&T) provided 900 numbers and billing and collection services for the LMAD game pursuant to an agreement with Teleline.[3] Plaintiffs also allege that AT&T operated the answering machines that were used to play the LMAD game, and they further contend that AT&T approved the game in advance, that it had full knowledge of the game's operation and content, and that it was actively involved in reviewing and modifying various aspects of the game.

Plaintiffs filed this class action lawsuit in November 1992, asserting claims under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1962 *et seq.*, for alleged acts of mail fraud, wire fraud, and illegal gambling committed in the operation of the LMAD game. Plaintiffs also assert claims under the Communications Act of 1934, 47 U.S.C. § 201 *et seq.;* the Georgia Racketeer Influenced and Corrupt Organizations Act (Georgia RICO), O.C.G.A. § 16-14-1 *et seq.;* and various other Georgia laws. On May 13, 1994, a master class and a Georgia subclass

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[2] According to the Plaintiffs, the rate was $3.88 per minute when the game ceased operation in December 1992.

[3] Plaintiffs originally named AT&T, Teleline, and USA Networks as Defendants in this action (the LMAD game was advertised on television commercials broadcast by USA Networks). However, Plaintiffs have since voluntarily dismissed their claims against Teleline, and they entered into a settlement agreement with USA Networks. Thus, AT&T is the sole remaining Defendant in this action.

were certified pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure. The master class is defined as follows:

> All natural persons who have been billed for telephone calls originating from their households made to the 900-number "Let's Make A Deal" game and have not received cash prizes exceeding such charges.

(Order of May 13, 1994 at 12). The Georgia subclass is similarly defined:

> All members of the class who have been charged for calls made from the State of Georgia to 900-860-4332 and/or other 900 prefix telephone numbers used to play "Let's Make A Deal."

(*Id.*).

Plaintiffs and Defendant have each filed a motion for partial summary judgment on Plaintiffs' federal RICO claims. In addition, Defendant has moved to decertify this action as a class action, contending that the Eleventh Circuit's decision in a related case, *Andrews v. American Tel. & Tel. Co.*, 95 F.3d 1014 (11th Cir. 1996), requires decertification of the present case. I first will consider Defendant's motion for decertification, and I then will address the parties' summary judgment motions.

II. MOTION TO DECERTIFY CLASS

In *Andrews v. American Tel. & Tel. Co.*, the Eleventh Circuit held that manageability problems precluded Rule

23(b)(3) certification in two cases[4] which are both related to the instant case. *See Andrews,* 95 F.3d at 1018. Defendant argues that the Eleventh Circuit's decision in *Andrews* compels decertification of this case for three reasons. First, Defendant argues that under *Andrews* Plaintiffs' RICO claims predicated on mail and wire fraud are inappropriate for class treatment because they require individualized showings of reliance, injury, and damages. Second, Defendant contends that Plaintiffs' RICO claims premised on illegal gambling are likewise precluded by the *Andrews* decision because they require an examination of the laws of all fifty states. Third, Defendant asserts that the *Andrews* court held that a class action is not a superior method of adjudicating RICO claims. I will address Defendant's arguments seriatim.

A. Mail and Wire Fraud Claims

Plaintiffs allege in their Complaint that the Defendant engaged in multiple acts of mail and wire fraud in connection with the LMAD game, and that these acts constitute a pattern of racketeering activity for purposes of civil RICO liability. *See* 18 U.S.C. §§ 1961(1), 1962(c), 1964(c). In *Andrews,* however, the Eleventh Circuit declared that the mail and wire fraud claims asserted by the *Andrews* class were "not wholly subject to class-wide resolution." *Andrews,* 95 F.3d at 1023-24 (citing *Pelletier v. Zweifel,* 921 F.2d 1465, 1499-1500 (11th Cir. 1991), and *Alabama v. Blue Bird Body Co.,* 573 F.2d 309, 328-29 (5th

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[4] The *Andrews* opinion addressed the appeal of class certification orders issued in two related cases, *Andrews v. American Tel. & Tel. Co.,* Civil No. 191-175 (S.D. Ga. May 13, 1994) and *Harper v. American Tel. & Tel. Co.,* Civil No. 192-134 (S.D. Ga. May 13, 1994).

Cir. 1978)). Similarly, the court stated with respect to the *Harper* class:

> Even if it could be shown that the appellants were engaged in a scheme to defraud and made misrepresentations to further that scheme, the plaintiffs would still have to show, on an individual basis, that they relied on the misrepresentations, suffered injury as a result, and incurred a demonstrable amount of damages.

Andrews, 95 F.3d at 1025 (citing *Pelletier,* 921 F.2d at 1498-1500, and *Blue Bird Body Co.,* 573 F.2d at 327). Thus, Defendant argues that in this case the Plaintiffs' mail and wire fraud claims cannot be maintained as a class action because of the presence of the individualized issues of reliance, injury, and damages.

This argument, however, ignores the central difference between the *Andrews* and *Harper* cases and the present case: *Andrews* and *Harper* each involved numerous different 900-number programs, whereas this case involves only the LMAD game. The issues of individual reliance, injury, and damages did not, by themselves, preclude class certification in *Andrews* and *Harper;* rather, the manageability problems became insurmountable only when combined with other factors. *See Andrews,* 95 F.3d at 1025 ("As in *Andrews,* the problems with trying the individualized elements of the [*Harper*] plaintiffs' claims, as well as handling the unique aspects of the 900-number programs, are compounded by the necessity of referencing fifty sets of credit card and consumer protection laws."); *id.* at 1027 (Barkett, J., dissenting in part) ("[T]he majority places too much emphasis on the number of different schemes involved [in *Andrews*], identifying this issue as the biggest one confounding class certification."). Indeed,

as noted by the dissenting member of the panel, "[I]ssues of individual reliance do not generally preclude Rule 23(b)(3) certification, particularly in cases where a common course of deceptive conduct is alleged." *Id.* at 1026 (Barkett, J., dissenting in part).

I previously concluded that the individual issues of reliance, injury, and damages do not preclude class certification in this case, and the panel majority's opinion in *Andrews* does not alter that conclusion. As I explained in the class certification order, damages do not present a significant hurdle in this case because there is evidence readily available to establish how much each class member was billed, and computer programs can further simplify the necessary calculations. (Order of May 13, 1994 at 10-11). Moreover, I concluded that reliance could virtually be presumed under the facts of this case, as any caller who played the game and who was charged more than he or she won in prizes was necessarily injured "by reason of" the game. (*Id.* at 8-9); *see also Pelletier,* 921 F.2d at 1499 ("A civil RICO plaintiff must show . . . that he was injured by reason of the defendant's acts of deception.").

Furthermore, I previously found that the game and its advertisements were fundamentally the same over the relevant time period. (Order of May 13, 1994 at 7-8). Thus, the Plaintiffs have basically alleged that the Defendant in this case "committed the same unlawful acts in the same method against the entire class." *Kirkpatrick v. J.C. Bradford & Co.,* 827 F.2d 718, 724 (11th Cir. 1987) (quoting *Kennedy v. Tallant,* 710 F.2d 711, 717 (11th Cir. 1983)). In this situation, "the mere presence of the factual issue of individual reliance [does] not render the claims unsuitable for class treatment." *Kirkpatrick,* 827 F.2d at 724-25; *cf. Blue Bird Body Co.,* 573 F.2d at 324 (noting that in price

fixing case wherein a homogenous product was marketed in a similar manner nationwide, "once the illegal overcharge . . . has been established, it is most reasonable to assume 'injury' or 'impact' upon a showing of proof of purchase").

In sum, I find that the Plaintiffs' mail and wire fraud claims do not present the same manageability problems identified by the Eleventh Circuit in *Andrews* and *Harper*. This case, unlike both of those cases, does not involve "hundreds of widely differing 900-number programs," *Andrews*, 95 F.3d at 1023, but rather involves only one game, the contours of which remained materially unchanged during the relevant time period. Thus, I am convinced that the issues of reliance, injury, and damages pertaining to the Plaintiffs' mail and wire fraud claims are not an obstacle to class certification under Rule 23(b)(3).

B. Illegal Gambling Claims

Plaintiffs also allege that the LMAD game constituted an "illegal gambling business" under 18 U.S.C. § 1955, and that Defendant therefore engaged in the "collection of unlawful debt" for RICO purposes. *See* 18 U.S.C. §§ 1961(6), 1962(c), 1964(c). Defendant argues, however, that the Eleventh Circuit ruled in *Andrews* that the gambling claims asserted by the plaintiffs in that case[5] were not suitable for class treatment because they would have necessitated an examination of the laws of all fifty states. Thus, Defendant contends, the gambling claims in the instant case are also unsuitable for class treatment.

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[5] The plaintiffs in *Harper* did not assert RICO claims predicated upon illegal gambling. *See Andrews*, 95 F.3d at 1021.

Contrary to Defendant's assertion, however, the Eleventh Circuit did not hold that the laws of all fifty states *must* be applied to RICO gambling claims brought in a nationwide class action. Indeed, the entire panel in *Andrews* seemed to implicitly accept the argument, advanced by the Plaintiffs in this case as well, that a gambling business violates RICO if it violates the gaming laws of any state in which the gambling business is conducted:

> The plaintiffs contend that only the gaming laws of Nebraska, [defendant] West Interactive's home state, need to be construed in order to assess the legality of the games of chance implicated in *Andrews,* because a gambling business is illegal under RICO if it is illegal under the laws of any state in which its affairs are conducted. But this contention assumes that Nebraska law prohibits each of the 900-number programs encompassed by the suit. If this assumption fails, each program that is legal in Nebraska will have to be assessed under each class member's home state law.

Andrews, 95 F.3d at 1024; *see also id.* at 1027 (Barkett, J., dissenting in part) ("As the majority recognizes, if the gambling schemes are illegal under the law of Nebraska, West Interactive's home state, then the schemes' illegality need not be examined under the laws of any other state.").[6]

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[6] I should emphasize, however, that the *Andrews* court did not expressly decide whether one state's laws may constitutionally be applied to all of the class plaintiffs' claims, as the court was not directly faced with that question. Furthermore, the resolution of this issue is not essential to deciding whether the present class action must be

(Continued on following page)

Moreover, I previously found that even if the legality of the LMAD game must be assessed under the laws of various jurisdictions, the relevant inquiries would be manageable because they would share many common questions and because any individual state-law issues would not predominate over the common questions presented in this case. (Order of May 13, 1994 at 10). Although one member of the *Andrews* panel agreed with the similar findings I made in that case, *see Andrews,* 95 F.3d at 1027 (Barkett, J., dissenting in part), the majority expressed reservations concerning the manageability of undertaking inquiries into the laws of all fifty states absent a thorough analysis of the various state laws by the class proponents. *See id.* at 1024 (citing *Castano v. American Tobacco Co.,* 84 F.3d 734, 741-42 (5th Cir.1996), for proposition that "[district] court cannot take class proponents' interpretations of law 'on faith' ").

Nevertheless, a close reading of the *Andrews* opinion reveals that the majority was more concerned with the number of programs at issue rather than the mere prospect of examining the gaming laws of all fifty states:

> With regard to the *Andrews* gambling claims, *the biggest problems* arise not so much in relation to the class plaintiffs' participation in the 900-number programs, *but with the contours of the programs themselves.* In assessing the gambling claims, *aspects of each 900-number program will have to be individually examined* to determine whether a particular program actually involves gambling or runs afoul of state gaming laws.

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decertified in light of *Andrews.* Thus, I will not address Defendant's choice-of- law arguments at this time.

Andrews, 95 F.3d at 1024 (emphasis supplied); *see also id.* ("The [defendants] cite the need to interpret and apply the gaming laws of all fifty states to assess the legality of *each 900-number program* as foremost among the difficulties in trying the gambling claims on a class basis, and we agree") (emphasis supplied). Thus, it was not simply the prospect examining fifty states' gaming laws, but rather the prospect of applying fifty states' gaming laws to hundreds of different 900-number programs, that rendered the *Andrews* gambling claims unsuitable for class treatment. *See id.* ("Scrutinizing hundreds of 900-number programs under the provisions of fifty jurisdictions complicates matters exponentially.").

The present case, by contrast, involves only one program – the LMAD game – the operational contours of which remained essentially the same during the relevant time period. The "biggest problems" identified by the Eleventh Circuit with respect to the *Andrews* gambling claims are not present in this case. Therefore, *Andrews* does not compel the conclusion that the Plaintiffs' RICO claims premised on illegal gambling render this class action unmanageable.

C. Superiority of Class Action

Finally, Defendant asserts that in *Andrews* the Eleventh Circuit held that a class action is not a superior method for adjudicating RICO claims because the statutory provisions for treble damages and attorneys' fees make even small individual claims feasible. Defendant's argument, however, overstates this aspect of the *Andrews* opinion. The court did not hold that a class action is an inferior method of adjudicating RICO claims; rather, the

court simply expressed doubt as to whether a class action is the *only* feasible method for adjudicating these claims:

> [A]lthough the district court stated that class treatment may be the "*only* feasible method of adjudication, given the small size of each member's claims," . . . we note that even small individual claims under RICO *can be feasible* given the possibility of the award of treble damages and attorneys' fees to successful plaintiffs.

95 F.3d at 1025 (internal citation omitted) (second emphasis supplied). Thus, *Andrews* does not foreclose class treatment of Plaintiffs' RICO claims. Accordingly, Defendant's Motion for Decertification is **DENIED**.

III. SUMMARY JUDGMENT MOTIONS

As previously mentioned, both the Plaintiffs and the Defendant have filed motions for partial summary judgment. Plaintiffs seek summary judgment on their federal RICO claims predicated on illegal gambling, and Defendant seeks summary judgment on all of the Plaintiffs' federal RICO claims.

A. Summary Judgment Standard

The Court should grant summary judgment only if "there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). Applicable substantive law determines which facts are material, that is, which facts have the potential to affect the outcome of the trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986). The Court must "resolve all reasonable doubts about the facts in favor of the non-movant, and draw all justifiable inferences

in his [or her] favor." *United States v. Four Parcels of Real Property,* 941 F.2d 1428, 1437 (11th Cir.1991) (en banc) (internal quotation marks and citations omitted).

The moving party has the initial burden of showing the Court, by reference to materials on file, the basis for its motion. *Celotex Corp. v. Catlett,* 477 U.S. 317, 323 (1986). However, the nature of the movant's initial burden "varies depending on whether the legal issues, as to which the facts in question pertain, are ones on which the movant or the non-movant would bear the burden of proof at trial." *Fitzpatrick v. City of Atlanta,* 2 F.3d 1112, 1115 (11th Cir. 1993). If the *movant* bears the burden of proof at trial, that party "must show that, on all the essential elements of its case, . . . no reasonable jury could find for the non-moving party." *Four Parcels,* 941 F.2d at 1438. On the other hand, if the *non-movant* has the burden of proof at trial, the movant may carry its initial burden either by negating an essential element of the non-movant's case or by demonstrating that there is an absence of evidence to prove a fact necessary to the non-movant's case. *See Clark v. Coats & Clark, Inc.,* 929 F.2d 604, 606-08 (11th Cir. 1991) (explaining *Adickes v. S.H. Kress & Co.,* 398 U.S. 144 (1970) and *Celotex Corp. v. Catrett,* 477 U.S. 317 (1986)). Merely stating that the non-movant cannot meet its burden at trial is insufficient. *Id.*

If – and only if – the movant carries this initial burden, the non-movant may avoid summary judgment only by "demonstrat[ing] that there is indeed a material issue of fact that precludes summary judgment." *Id.* at

608.[7] Again, this burden varies depending upon whether the movant or non-movant bears the burden of proof at trial. If the movant has the burden of proof at trial, the non-movant may avoid summary judgment only by coming forward with evidence sufficient to withstand a motion for directed verdict at trial. *Fitzpatrick,* 2 F.3d at 1116 (citation omitted). If the non-movant bears the burden of proof at trial, the non-movant's response must be tailored to the method by which the movant carried its initial burden. If the movant presented evidence affirmatively negating a material fact, the non-movant "must respond with evidence sufficient to withstand a directed verdict motion at trial on the material fact sought to be negated." *Id.* If the movant demonstrated an absence of evidence on a material fact, the non-movant must either show that the record contains evidence that was "overlooked or ignored" by the movant, or "come forward with additional evidence sufficient to withstand a directed verdict motion at trial based on the alleged evidentiary deficiency." *Id.* (citation omitted).

The clerk has given the non-moving parties notice of the respective summary judgment motions, of the right to file affidavits or other materials in opposition, and of the consequences of default. Therefore, the notice requirements of *Griffith v. Wainwright,* 772 F.2d 822 (11th Cir.1985), are satisfied. The time for filing materials in

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[7] The non-movant cannot carry its burden by relying on the pleadings or by repeating conclusory allegations contained in the complaint. *See Morris v. Ross,* 663 F.2d 1032, 1033-34 (11th Cir.1981). Rather, the non-movant must respond by affidavits or as otherwise provided by Rule 56 of the Federal Rules of Civil Procedure.

opposition has expired, and the motions are ripe for consideration.

B. Plaintiffs' Motion

In order to fully understand the Plaintiffs' arguments for summary judgment, it is first necessary to examine their contentions with respect to the RICO gambling claims. Civil RICO liability may be imposed upon

> any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, [who] conduct[s] or participate[s], directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. §§ 1962(c), 1964(c). An "unlawful debt" for RICO purposes is defined as

> a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, . . . and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof.

18 U.S.C. § 1961(6). Under 18 U.S.C. § 1955, it is a federal felony to "conduct[ ], finance[ ], manage[ ], supervise[ ], direct[ ], or own[ ] all or part of an illegal gambling business." An "illegal gambling business" is defined as follows:

> (b) As used in this section –
>
> (1) "illegal gambling business" means a gambling business which –

> (i) is a violation of the law of a State or political subdivision in which it is conducted;
>
> (ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and
>
> (iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

18 U.S.C. § 1955(b)(1). "Gambling" is broadly defined to include, but is not limited to, "pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita, or numbers games, or selling chances therein." 18 U.S.C. § 1955(b)(2).

Plaintiffs argue that the LMAD game was conducted in California and that it violated California gaming laws.[8] Thus, they contend, the LMAD game was an "illegal gambling business" under § 1955, and any debts incurred in playing the game constituted "unlawful debts" within the meaning of § 1961(6). Therefore, Plaintiffs argue, Defendant is liable under § 1962(c) for collecting those unlawful debts.

However, even assuming the Plaintiffs are correct that the debts incurred in playing the LMAD game were unlawful debts under the RICO statutes, summary judgment is inappropriate because the Plaintiffs have not fully addressed the other elements necessary for the imposition of civil RICO liability. In order to prevail on their RICO

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[8] Plaintiffs also assert, with respect to the claims of the Georgia subclass, that the LMAD game was conducted in Georgia and violated Georgia gaming laws.

gambling claims, Plaintiffs must also prove, *inter alia,* (1) that there was a RICO enterprise; (2) that the enterprise's activities affected interstate or foreign commerce; (3) that Defendant was employed by or associated with the enterprise; (4) that Defendant participated, either directly or indirectly, in the conduct of the enterprise's affairs; and (5) that Defendant participated through the collection of unlawful debt. *See* 18 U.S.C. § 1962(c); *United States v. Starrett,* 55 F.3d 1525, 1541 (11th Cir. 1995), *cert. denied,* 116 S. Ct. 1335 (1996); *Durante Bros. & Sons, Inc. v. Flushing Nat'l Bank,* 755 F.2d 239, 248 (2d Cir. 1985). Plaintiffs have not made an affirmative showing that no reasonable jury could find for Defendant on these essential elements of their RICO gambling claims. *See Fitzpatrick,* 2 F.3d at 1115 (describing summary judgment burden when movant bears burden of proof). Accordingly, Plaintiffs' Motion for Partial Summary Judgment is **DENIED**. As Plaintiffs' summary judgment motion has been denied, Defendant's Request to Strike is **DENIED** as moot.

C. Defendant's Motion

Defendant has also moved for summary judgment on the Plaintiffs' federal RICO claims. Defendant contends that the Plaintiffs cannot prevail on these claims as a matter of law because they cannot establish several of the elements necessary for civil RICO liability. Specifically, Defendant argues that Plaintiffs cannot prove the existence of a RICO enterprise and, even assuming the existence of such an enterprise, Plaintiffs cannot show that the Defendant participated in the conduct of the enterprise's affairs within the meaning of 18 U.S.C. § 1962(c). Furthermore, Defendant claims that the Plaintiffs cannot show a legally compensable RICO injury because some

class members either received refunds or did not pay the charges billed for calling the LMAD 900 numbers. Finally, Defendant contends that Plaintiffs cannot prevail on their RICO gambling claims because Defendant was not in the business of gambling.

1. Existence of a RICO Enterprise

Under 18 U.S.C. § 1961(4), a RICO "'enterprise' includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." Defendant makes two arguments that this definition is not met in this case. First, Defendant argues that the LMAD game cannot constitute a legally cognizable RICO enterprise because it is only a technology. In support of this argument, Defendant refers to several cases which hold that a RICO enterprise must be an association of natural persons or legal entities rather than merely a collection of inanimate objects or a technology. *See, e.g., Guidry v. Bank of LaPlace,* 954 F.2d 278, 282-83 (5th Cir. 1992) (holding that bank account cannot constitute RICO enterprise); *Creed Taylor, Inc. v. CBS, Inc.,* 718 F. Supp. 1171, 1178 (S.D.N.Y. 1989) ("A RICO enterprise must be an association of natural persons or legal entities. It cannot be a collection of inanimate objects or a technology."). This argument, however, misstates the nature of the enterprise alleged in this case. Plaintiffs do not argue that the LMAD game itself constituted an enterprise; rather, Plaintiffs contend that the enterprise was the association of Defendant, Teleline, and others for purposes of conducting the LMAD game. (*See* Amended Complaint ¶ 64). Thus, Plaintiffs have alleged a sufficient association-in-fact for RICO purposes. *See United States v. Caporale,* 806 F.2d

1487, 1499 (11th Cir. 1986) ("[T]he term 'enterprise' as broadly defined by the statute embraces not only formally defined entities, but associations of entities.")

Defendant's second argument is more alluring, but it too is ultimately unpersuasive. In *United States v. Turkette,* 452 U.S. 576, 583 (1981), the Supreme Court emphasized that a RICO enterprise "is an entity separate and apart from the pattern of activity in which it engages," and that the existence of the enterprise is a separate element that must be proved in any RICO case. Defendant argues that the Plaintiffs in this case cannot show an enterprise that is distinct from the commission of the predicate acts themselves. In other words, Defendant argues that the only link between the members of the alleged enterprise are the predicate offenses of mail fraud, wire fraud, and illegal gambling allegedly committed in connection with the LMAD game. Thus, Defendant contends, Plaintiffs cannot show the existence of a separate and distinct RICO enterprise.

Plaintiffs, on the other hand, assert that no such showing is required in the Eleventh Circuit, citing *United States v. Cagnina,* 697 F.2d 915, 920-22 (11th Cir. 1983). Plaintiffs' argument, however, is belied by both the Supreme Court's opinion in *Turkette* and Eleventh Circuit case law. *See Turkette,* 452 U.S. at 583 ("The 'enterprise' is not the 'pattern of racketeering activity'; it is an entity separate and apart from the pattern of activity in which it engages."); *United States v. Bascaro,* 742 F.2d 1335, 1362 (11th Cir. 1984) ("[T]he existence of an enterprise is an element of a RICO violation distinct from the element of a pattern of racketeering activity in which the enterprise engages."). Indeed, although the Eleventh Circuit indicated in *Cagnina* that proof of an "ascertainable structure"

is not required in this circuit, *see Cagnina,* 697 F.2d at 921 (recognizing disagreement with Eighth Circuit), the court also recognized that under *Turkette* "both an enterprise and a pattern of racketeering activity must be shown." *Id.*

Defendant further contends that these separate elements require separate proof. That is, Defendant asserts that under *Turkette* the Plaintiffs cannot rely on the same evidence to establish both the existence of the RICO enterprise and the pattern of racketeering activity (or the collection of unlawful debt). Like the Plaintiffs' argument that a separate enterprise need not be shown, however, Defendant's argument that separate proof is required to establish the enterprise's existence is contradicted by the text of *Turkette. See* 452 U.S. at 583 ("[T]he proof used to establish these separate elements [enterprise and pattern of racketeering activity] may in particular cases coalesce . . . ."). Furthermore, in *Cagnina* the Eleventh Circuit "rejected the assertion that the Government must submit proof of an enterprise distinct from the evidence showing a pattern of racketeering." *Cagnina,* 697 F.2d at 921.

Thus, it is clear that while the Plaintiffs must show the existence of an enterprise which is distinct from the series of predicate acts alleged in this case, *Turkette,* 452 U.S. at 583, they may rely on the same evidence to show both the commission of the predicate acts and the existence of the enterprise. *Id.; see also Cagnina,* 697 F.2d at 921; *United States v. Mazzei,* 700 F.2d 85, 87-90 (2d Cir. 1983); *United States v. Bagnariol,* 665 F.2d 877, 890-91 (9th Cir. 1981). Furthermore, although Plaintiffs must present "evidence of an ongoing organization, formal or informal, and . . . evidence that the various associates function[ed] as a continuing unit," *Turkette,* 452 U.S. at

583, they need not show that the enterprise had an ascertainable structure, *Cagnina,* 697 F.2d at 921, and the enterprise's existence may be proven by circumstantial evidence. *United States v. Elliott,* 571 F.2d 880, 898 (5th Cir. 1978).

The enterprise alleged in this case is the association of Defendant, Teleline, and others for purposes of conducting the LMAD 900-number game. There is ample evidence in the record that the LMAD game was conducted by an ongoing organization and that the associates of this organization conducted the game on a continuing basis until the game ceased operation in December 1992. Thus, there is at least a genuine issue of fact with respect to the existence of this enterprise.

Nevertheless, Defendant insists that the Plaintiffs' evidence consists of nothing more than the minimal association surrounding the commission of the alleged predicate acts, which Defendant contends is insufficient to establish the existence of a separate and distinct enterprise. *See Stephens, Inc. v. Geldermann, Inc.,* 962 F.2d 808, 815 (8th Cir. 1992) (citing *United States v. Bledsoe,* 674 F.2d 647, 664 (8th Cir. 1982)); *Atlas Pile Driving Co. v. DiCon Financial Co.,* 886 F.2d 986, 995-96 (8th Cir. 1989). Even assuming this requirement is applicable in this circuit,[9] however, there is evidence that the association

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[9] The Eleventh Circuit noted in *Cagnina* that it takes a less restrictive view of the enterprise requirement than does the Eighth Circuit. *Cagnina,* 697 F.2d at 921; *see also* David Vitter, Comment, *The RICO Enterprise as Distinct from the Pattern of Racketeering Activity: Clarifying the Minority View,* 62 Tul. L. Rev. 1419, 1424-27 (1988) (noting that Eleventh Circuit is within majority view which "impose[s] no special requirement [beyond the two requirements identified in

(Continued on following page)

went beyond the minimal association surrounding the predicate acts. The predicate acts alleged by Plaintiffs are numerous acts of mail fraud and wire fraud – which allegedly constitute a pattern of racketeering activity – and collection of unlawful debt. Clearly, the operation of the LMAD game involved more than these alleged activities. In short, Plaintiffs appear to have alleged a sufficient RICO enterprise, and they have come forward with sufficient evidence to raise a genuine issue of fact concerning its existence.

2. Participation in the Conduct of the Enterprise's Affairs

In order to impose RICO liability under 18 U.S.C. § 1962(c), the Plaintiffs must show that the Defendant "conduct[ed] or participate[d], directly or indirectly, in the conduct of [the] enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." As the Eleventh Circuit has stated, § 1962(c) does not punish a defendant simply for engaging in racketeering activity or for collecting unlawful debt; rather, it punishes his "participation in the affairs of an enterprise through those means." *United States v. Pepe,* 747 F.2d 632, 661 n.48 (11th Cir. 1984). Defendant contends that the Plaintiffs cannot satisfy this element of their RICO claims for two reasons.

First, Defendant claims that Plaintiffs cannot show the requisite level of participation in the affairs of the enterprise. In *Reves v. Ernst & Young,* 507 U.S. 170, 185 (1993), the Supreme Court held "that 'to conduct or

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Turkette] regarding distinctness between the enterprise and the pattern of racketeering activity").

participate, directly or indirectly, in the conduct of such enterprise's affairs,' . . . one must participate in the operation or management of the enterprise itself." Although "*some* part in directing the enterprise's affairs is required," *id.* at 179, the Eleventh Circuit has stated that a RICO defendant "may be liable under the [*Reves*] operation or management test by 'knowingly implementing decisions, as well as by making them.'" *Starrett,* 55 F.3d at 1548 (quoting *United States v. Oreto,* 37 F.3d 739, 750 (1st Cir. 1994)).[10]

Defendant argues that it had no part in the operation or management of the LMAD game because it simply provided telecommunication, billing, and collection services to Teleline in connection with the LMAD game. Defendant analogizes these activities to professional services, which have been held insufficient by themselves to satisfy *Reves. See, e.g., University of Md. v. Peat, Marwick, Main & Co.,* 996 F.2d 1534, 1539 (3rd Cir. 1993); *Wiselman v. Oppenheimer & Co.,* 835 F. Supp. 1398, 1404 (M.D. Fla. 1993). However, Plaintiffs contend that Defendant's participation in the LMAD enterprise extended beyond the provision of these services. For example, Plaintiffs contend that Defendant, *inter alia,* approved and edited the scripts and the advertising used in the LMAD game, reviewed and altered the prize structure and the

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[10] I note that there is an apparent split of authority concerning whether, under *Reves,* RICO liability extends only to those who have some part in the management or control of the enterprise or to all those who are within the enterprise's chain of command. *Compare Starrett,* 55 F.3d at 1548, *and Oreto,* 37 F.3d at 750 (adopting chain-of-command test), *with United States v. Viola,* 35 F.3d 37, 41 (2d Cir. 1994) (taking strict view of operation or management test). *See generally* Recent Case, 108 Harv. L. Rev. 1405 (1995) (analyzing *Oreto* and *Viola*).

rules of the game, and exercised control over the length and price of calls to the LMAD game.

Plaintiffs derive the bulk (though not all) of their evidentiary support for these assertions from the 1996 deposition testimony of Robert H. Lorsch, president of Teleline. Defendant argues that the Plaintiffs cannot rely on much of this testimony because it contradicts the deposition testimony given by Mr. Lorsch in 1993. It is true, as Defendant contends, that a party may not create a genuine issue of fact by relying upon an individual's sworn testimony that directly contradicts earlier testimony by that same individual. *See Van T. Junkins & Assocs. v. U.S. Indus.*, 736 F.2d 656, 658-59 (11th Cir. 1984); *Kennett-Murray Corp. v. Bone*, 622 F.2d 887, 893-95 (5th Cir. 1980). However, I find that Mr. Lorsch's 1996 testimony is not so inherently inconsistent with his 1993 testimony as to constitute a sham. *See Kennett-Murray Corp.*, 622 F.2d at 894. Plaintiffs' evidence conceivably could support a finding that Defendant had a role in directing the affairs of the LMAD enterprise. Thus, there is a genuine issue of fact concerning whether Defendant participated in the operation or management of the LMAD enterprise within the meaning of *Reves*.

Second, Defendant argues that § 1962(c) requires Plaintiffs to establish some "nexus between the prohibited activity and the conduct of the enterprise's affairs." *United States v. Dennis*, 458 F. Supp. 197, 199 (E.D. Mo. 1978) (quoting *United States v. Rubin*, 559 F.2d 975, 990 (5th Cir. 1977)). Defendant contends that even assuming the Plaintiffs prove that Defendant engaged in the alleged predicate acts, their RICO claims must fail as a matter of law because Plaintiffs cannot show that Defendant participated in the conduct of the enterprise's affairs *through*

those predicate acts. Although Defendant does not go into great detail with respect to this argument, its contention appears to be that the commission of the predicate acts themselves must also be the acts which constitute participation in the operation or management of the enterprise under *Reves.*[11]

Although I note that Defendant's argument is not entirely without support in the case law, *see University of Md.*, 996 F.2d at 1539 (holding that RICO defendant "must knowingly engage in '*directing* the enterprise's affairs' through a pattern of racketeering activity") (quoting *Reves,* 507 U.S. at 179) (emphasis supplied by *University of Md.* court), it seems anomalous to require that the predicate acts necessary for RICO liability must also be the acts which are sufficient to subject the defendant to § 1962(c) liability under *Reves.* Indeed, the activities which will subject a defendant to RICO liability under § 1962(c) – a pattern of racketeering activity (*e.g.,* mail fraud, wire fraud, extortion, bribery, murder, etc.) or the collection of unlawful debt – are not the type of activities ordinarily involved in "*directing* [an] enterprise's affairs." *Reves,* 507 U.S. at 179 (emphasis supplied).

The problem with Defendant's argument is that it merges two separate requirements for § 1962(c) liability: (1) the requirement that the defendant participate in the operation or management of the enterprise itself, *Reves,*

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[11] For example, Defendant argues that "Plaintiffs' claims fail because they have not established the required nexus, *i.e.,* they *do not* prove that, through a pattern of racketeering or the collection of charges incurred for calls to the LMAD program, AT&T actually conducted the LMAD program." (Br. in Supp. of Def.'s Cross-Mot. for Partial Summ. J. at 9).

507 U.S. at 185, and (2) the requirement that there be some relationship or connection between the predicate acts and the affairs of the enterprise. *See United States v. Carter,* 721 F.2d 1514, 1525-27 (11th Cir. 1984). Shortly after the *Reves* decision, the Fourth Circuit noted the distinction between these two requirements:

> The issue in *Reves* is distinguishable from the issue in this case. *Reves* emphasized defining "conduct" and "participate" to determine *who* could be brought within RICO's ambit and decided that only those who manage or operate an enterprise are covered under RICO. In this case, however, we examine the connection required between the racketeering activity and an enterprise's affairs . . . .

United States v. Grubb, 11 F.3d 426, 439 (4th Cir. 1993) (emphasis supplied).[12] The nexus requirement articulated in *Dennis,* the case relied upon by Defendant, refers to the second requirement mentioned above.

Indeed, a comparison with the *Dennis* case aptly illustrates the nature of the nexus requirement and why it is met in this case. In *Dennis,* the defendant was alleged to have been collecting debts from his coworkers while on the premises of his employer (General Motors Assembly Division), which debts purportedly arose from usurious

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[12] *See also Starrett,* 55 F.3d at 1541 ("To establish a violation of 18 U.S.C. § 1962(c), the government must prove: . . . (4) that the defendants participated, directly or indirectly, in the conduct of the enterprise's affairs; and (5) that the defendants participated through a pattern of racketeering activity."); Christopher W. Madel, *The Modern RICO Enterprise: The Inoperation and Mismanagement of* Reves v. Ernst & Young, 71 Tul. L. Rev. 1133, 1191-94 (1997) (explaining difference between these two requirements).

loans made by the defendant. *Dennis,* 458 F. Supp. at 198. The court thus faced the question "whether the collection of unlawful debts by an employee from co-employees on the premises of an enterprise affecting interstate commerce constitutes participation in the enterprise's affairs through the collection of unlawful debts." *Id.* The court concluded that although there was a geographic nexus between the defendant's alleged activities and the enterprise (*i.e.,* because he was employed by the enterprise and collected the debts on its premises), there was no nexus between these alleged activities and the conduct of the enterprise. *Id.* at 199. The court accordingly dismissed the RICO indictment. *Id.*

Here, by contrast, the predicate acts alleged to have been committed by the Defendant – mail fraud, wire fraud, and collection of unlawful debt – were allegedly committed in furtherance of the LMAD 900-number game. These activities have a clear and substantial nexus to the conduct of the LMAD enterprise alleged by the Plaintiffs. Thus, Defendant is not entitled to summary judgment on these grounds.[13]

3. Compensable RICO Injury

The Supreme Court has stated that a RICO plaintiff "can only recover to the extent that . . . he has been injured in his business or property by the conduct constituting the

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[13] Defendant also asserts that it is entitled to summary judgment on the Plaintiffs' RICO claims predicated on mail and wire fraud because Plaintiffs have failed to address whether Defendant "conducted the LMAD 900-number program 'through a pattern of racketeering activity.'" (Defendant's Consolidated Reply at 22). This argument fails, however, for the same reasons stated above.

violation." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985). Defendant notes that some class members either did not pay or received refunds for the charges billed to them for calling the LMAD game. Thus, Defendant contends, the Plaintiffs cannot show a compensable RICO injury and summary judgment should be granted in Defendant's favor on the Plaintiffs' RICO claims.

It may well be true, as Defendant argues, that class members who did not pay or who received a refund may not maintain a RICO claim against Defendant. *See Commercial Union Assurance Co. v. Milken*, 17 F.3d 608, 612 (2d Cir. 1994). This does not, however, entitle Defendant to summary judgment on the RICO claims of the entire class. Indeed, Defendant's argument seems to be more an attack upon the viability of this case as a class action rather than an argument for summary judgment. In any event, I have already concluded that this action should remain a class action. *See supra* Part II. Moreover, as I noted in the Class Certification Order, "It would be unjust to effectively deny a class of individuals an opportunity to assert their claims merely because the record-keeping of the defendants or their business associates did not anticipate eventual turbulence in the 900-number market." (Order of May 13, 1994 at 11).

4. Collection of Unlawful Debt

Finally, Defendant argues that it is entitled to summary judgment on the Plaintiffs' RICO gambling claims because Defendant did not engage in the "collection of unlawful debt." Defendant notes that the statutory definition of "unlawful debt" under 18 U.S.C. § 1961(6) has two prongs: (1) the debt must have been "incurred or contracted

in gambling activity which was in violation" of federal or state law, and (2) the debt must have been "incurred in connection with the business of gambling in violation" of federal or state law. Defendant contends that Plaintiffs cannot satisfy the second prong of this definition because Defendant is not in the business of gambling, but rather is in the telecommunications business.

Defendant's argument is unpersuasive. Contrary to Defendant's assertions, the statute does not require proof that a RICO defendant is solely, or even primarily, engaged "in the business of gambling"; rather, by its plain terms the statute requires proof that the *debt* collected by the defendant "was incurred in connection with the business of gambling." 18 U.S.C. § 1961(6). Defendant cites several cases for the proposition that the two-pronged definition of § 1961(6) was established because Congress "sought to punish only large scale gambling operations involving 'organized crime' as contrasted with small time gambling." *United States v. Salinas,* 564 F.2d 688, 691 (5th Cir. 1977). However, it is well established that the RICO statutes apply beyond the organized-crime context. *See, e.g., National Org. for Women, Inc. v. Scheidler,* 510 U.S. 249, 260 (1994) ("The occasion for Congress' action was the perceived need to combat organized crime. But Congress for cogent reasons chose to enact a more general statute, one which, although it had organized crime as its focus, was not limited in application to organized crime.") (quoting *H.J. Inc. v. Northwestern Bell Tel., Co.,* 492 U.S. 229, 248 (1989)).[14] Furthermore, *if* the LMAD game is determined

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[14] Indeed, since RICO's enactment in 1970 many attempts have been made – including some by this Judge – to persuade Congress to narrow, or at least clarify, the scope of civil RICO liability. With few

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to constitute illegal gambling under 18 U.S.C. § 1955, the extent of the game's operations would place it far beyond the ambit of the "small time gambling" meant to be excluded from the RICO statutes. Thus, Defendant has not shown that it is entitled to judgment as a matter of law on the Plaintiffs' RICO gambling claims.

In short, none of the arguments advanced by Defendant establish that summary judgment should be granted in its favor on all or a portion of the Plaintiffs' federal RICO claims. Accordingly, Defendant's Cross-Motion for Partial Summary Judgment is **DENIED**.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs' Motion for Partial Summary Judgment is **DENIED** and Defendant's Request to Strike is **DENIED** as moot. Defendant's Motion for Decertification and its Cross-Motion for Partial Summary Judgment are also **DENIED**. This case shall proceed to trial accordingly.

ORDER ENTERED at Augusta, Georgia, this 26th day of March, 1998.

/s/ Dudley H. Bowen, Jr.
UNITED STATES
DISTRICT JUDGE

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exceptions, however, Congress has turned a deaf ear to these pleas, leaving the courts to wrestle with the deceptive simplicity of the statutory text.

IN THE UNITED STATES DISTRICT COURT FOR THE

SOUTHERN DISTRICT OF GEORGIA

STATESBORO DIVISION

JAMES W. SIKES, and FELIX KEMP, Individually and on Behalf of All Other Persons Similarly Situated,	*	
Plaintiffs,	*	CV-692-147
vs.	*	
AMERICAN TELEPHONE & TELEGRAPH COMPANY,	*	
Defendant.	*	

ORDER

(Filed October 7, 1998)

Before the Court in the above-captioned matter is Defendant's Request to Amend Order to Permit Immediate Interlocutory Appeal of Class Certification Issue pursuant to 28 U.S.C. §1292. Defendant has also filed supplemental material including the testimony of Plaintiff's expert witness, Dr. Zinkhan, in support of its Motion. Upon consideration of the briefs submitted by counsel and oral arguments, Defendant AT&T's Motion is hereby **GRANTED**.

Defendant contends that interlocutory appeal of the Order Denying Defendant's Motion to Decertify the Class in this case is needed because of the substantial difference of opinion and material impact the issue of class certification

raises. Immediate interlocutory appeal is appropriate pursuant to 28 U.S.C. §1292(b)

> [w]hen a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation . . . .

After careful consideration, I have concluded that class certification in this case is an appropriat issue for appellate review. Specifically, the individual reliance necessary to support Plaintiffs' fraud claims and whether this can be presumed on a class-wide basis is the subject of much dispute. Because the appellate courts have not addressed this issue in a comprehensive manner, the appropriate legal standard is arguably unclear.

Further, whether or not this case proceeds as a class action will have a material impact on its ultimate determination. Class action status will substantially impact settlement negotiations and influence the determination of the appropriate state law to be applied at trial.

I have also considered Defendant's Supplemental Brief and its inclusion of Dr. Zinkhan's testimony in support of its contention that the class should be decertified. In revisiting the issue of class certification in this case, I evaluated Dr. Zinkhan's testimony and concluded that it does not change my decision to grant class certification.

Defendant also contends the Court's Order granting class certification does not clearly state which state's law

will govern Plaintiffs' gambling claims. In order to eliminate any confusion, I now conclude that the laws of each state from which a call was made to a Let's Make A Deal 900-number will be used to evaluate the gambling claims in this litigation.

Accordingly, Defendant's Request to Amend Order to Permit Immediate Interlocutory Appeal of Class Certification Issue pursuant to 28 U.S.C. §1292 is **GRANTED**. For purposes of statistical reporting, the Clerk of the Court is directed to **CLOSE** this case and to **TERMINATE** all motions pending therein. This case may be reopened by either party upon conclusion of the appeal.

ORDER ENTERED at Augusta, Georgia, this 7th day of October, 1998.

/s/ Dudley H. Bowen, Jr.
CHIEF UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-01338

JAMES W. SIKES, et al.

Respondents,

versus

AMERICAN TELEPHONE
AND TELEGRAPH COMPANY,

Petitioners.

Application for Permission to Appeal
from the United States District Court for the
Southern District of Georgia

(Filed Jan. 05, 1999)

Before: **BLACK, CARNES and MARCUS, Circuit Judges.**

BY THE COURT:

The petition for permission to appeal pursuant to 28 U.S.C. Section 1292(b) is **GRANTED**.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-8007-HH

JAMES W. SIKES, FELIX KEMP,
Individually and On Behalf of
All Other Person [sic] Similarly
Situated,

Plaintiffs-Appellees,

versus

TELELINE, INC, USA NETWORKS,

Defendants,

AMERICAN TELEPHONE & TELEGRAPH
COMPANY,

Defendant-Appellant.

On Appeal from the United States District Court for the Southern District of Georgia

(Filed Apr 11, 2002)

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

(Opinion ___, 11th Cir., 19___, ___ F.2d ___).

Before: TJOFLAT, WILSON and FLETCHER,* Circuit Judges.

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* Honorable Betty B. Fletcher, U.S. Circuit Judge for the Ninth Circuit, sitting by designation.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en bane (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Gerald B. Tjoflat
UNITED STATES CIRCUIT JUDGE

18 U.S.C. § 1955. Prohibition of illegal gambling businesses

(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined under this title or imprisoned not more than five years, or both.

(b) As used in this section –

(1) "illegal gambling business" means a gambling business which –

(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

(2) "gambling" includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein.

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

(c) If five or more persons conduct, finance, manage, supervise, direct, or own all or part of a gambling business and such business operates for two or more successive days, then, for the purpose of obtaining warrants for

arrests, interceptions, and other searches and seizures, probable cause that the business receives gross revenue in excess of $2,000 in any single day shall be deemed to have been established.

(d) Any property, including money, used in violation of the provisions of this section may be seized and forfeited to the United States. All provisions of law relating to the seizures, summary, and judicial forfeiture procedures, and condemnation of vessels, vehicles, merchandise, and baggage for violation of the customs laws; the disposition of such vessels, vehicles, merchandise, and baggage or the proceeds from such sale; the remission or mitigation of such forfeitures; and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to seizures and forfeitures incurred or alleged to have been incurred under the provisions of this section, insofar as applicable and not inconsistent with such provisions. Such duties as are imposed upon the collector of customs or any other person in respect to the seizure and forfeiture of vessels, vehicles, merchandise, and baggage under the customs laws shall be performed with respect to seizures and forfeitures of property used or intended for use in violation of this section by such officers, agents, or other persons as may be designated for that purpose by the Attorney General.

(e) This section shall not apply to any bingo game, lottery, or similar game of chance conducted by an organization exempt from tax under paragraph (3) of subsection (c) of *section 501 of the Internal Revenue Code of 1954*, as amended, if no part of the gross receipts derived from such activity inures to the benefit of any private shareholder, member, or employee of such organization except as

compensation for actual expenses incurred by him in the conduct of such activity.

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18 U.S.C. § 1961. Definitions

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

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18 U.S.C. § 1962. Prohibited activities

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

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18 U.S.C. § 1964. Civil remedies

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains

and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final.

Rule 23(b)(3) Fed.R.Civ.P. provides:

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

* * *

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 94-8575

JAMES W. SIKES and FELIX KEMP,
individually and on behalf of
all other persons similarly situated,

Plaintiffs-Appellees,

versus

TELELINE, INC.,

Defendant-Cross-Defendant,

AMERICAN TELEPHONE & TELEGRAPH COMPANY,

Defendant-Cross-Claimant-Appellant,

USA NETWORKS,

Defendant.

Appeal from the United States District Court for the
Southern District of Georgia

(Filed Jan. 27, 1995)

Before DUBINA, CARNES and BARKETT, Circuit Judges.

BY THE COURT:

Appellees' motion to dismiss the appeal for lack of jurisdiction is GRANTED. The district court's May 13, 1994, order is not appealable under the collateral order doctrine because the court did not finally resolve the type of notice which would be sent to prospective class members in this action. *See, e.g. Gulfstream Aerospace Corp. v.*

Mayacamas Corp., 485 U.S. 271, 108 S.Ct. 1133, 99 L.Ed.2d 296 (1988).

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF GEORGIA

STATESBORO DIVISION

JAMES W. SIKES, INDIVIDUALLY AND ON BEHALF OF ALL OTHER PERSONS SIMILARLY SITUATED,	)	
Plaintiffs,	)	
v.	)	Case No. CV692-147
AMERICAN TELEPHONE AND TELEGRAPH COMPANY,	)	
Defendant.	)	

ORDER

(Filed March 24, 1997)

Plaintiffs have filed a motion to compel discovery of certain documents and answers to interrogatories. Plaintiffs' motion is GRANTED in part and DENIED in part.

Names And Addresses Of Callers

In interrogatories and document requests, plaintiffs have sought the names and addresses of all individuals who called the Let's Make A Deal (LMAD) 900-number program. Defendant asserts that it only has the phone numbers of callers, and that information concerning the names and addresses of callers was in the possession, custody, and control of various Local Exchange Carriers who conducted the actual billing and collection of charges. Plaintiffs argue that computer records it has obtained from third parties suggest that defendant possesses

records with these names and addresses. Since defendant has repeatedly denied having this information, the Court will not order their production. However, the Court cautions defendant that severe sanctions will be assessed against it if further developments reveal that its denials regarding possession of this information have been untruthful.

Plaintiffs also seek all documentation concerning defendant's reverse directory and cluster analysis capabilities. Plaintiffs contend that this information is relevant to test defendant's assertion that it does not have the capability to provide the names and addresses of LMAD callers. Given the sanctions that await defendant if its contentions turn out to be untrue, the Court concludes that additional discovery on this tangential issue would incur an undue burden and expense to defendant.

LMAD Revenues

Plaintiffs also seek an answer to its interrogatory concerning the total amount of money billed and collected for calls to the LMAD game. Defendant invoked Fed. R. Civ. P. 33(c) to submit billing and call detail records in lieu of answering the interrogatory. Plaintiffs argue that these documents do not provide the information they desire and that defendant has the capacity to generate more complete revenue summaries. Since defendant has asserted that it has produced all of its nonprivileged documents relating to its LMAD revenues, the Court will not order production of additional documents relating to LMAD revenues.[1] The

[1] Plaintiffs have presented some evidence suggesting that defendant has not produced all of its records relating to LMAD revenues. As

(Continued on following page)

Court also notes that defendant does not have a duty to create a document summarizing all of the financial information relating to LMAD. *See Rockwell International Corp. v. H. Wolfe Iron and Metal Co.*, 576 F. Supp. 511, 512 (W.D. Pa. 1983); *Soetaert v. Kansas City Coca Cola Bottling Co.*, 16 F.R.D. 1, 2 (W.D. Mo. 1954); *U.S. v. U.S. Alkali Export Ass'n, Inc.*, 7 F.R.D. 256, 259 (S.D.N.Y. 1946).

Defendant's counsel has indicated during correspondence that defendant generated only some revenue information concerning the LMAD program. *See* Pls.' Reply Brief In Support Of Motion To Compel, Exh. B. Given the admitted incompleteness of this revenue information, the Court orders defendant to answer the interrogatory unless the parties can reach a stipulation regarding the revenue generated by the LMAD program.

900-Numbers Used And Dates Of Operation

Plaintiffs asked defendant to list each 900 number used for the LMAD game and the dates of operations for such use. While defendant has supplied the phone numbers, it has not provided the dates. Defendant is ordered to provide the requested dates through an answer to the interrogatory or through the production of documents.

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already discussed, defendant would be subject to sanctions if later events prove that its responses to this document request have not been truthful.

Format Of Documents Produced

Finally, plaintiff complains that the call detail records and LMAD revenue documents produced by defendant have been in a paper format or copies of microfiche rather than in a computer format. Defendant has apparently sent similar records in computer format to Direct American Marketers and Teleline, Inc. Therefore, the Court instructs defendant to produce its call detail records and financial documents in computer format.

SO ORDERED this 24th day of March, 1997.

/s/ G. R. Smith
UNITED STATES MAGISTRATE JUDGE
SOUTHERN DISTRICT OF GEORGIA

ORIGINAL

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA STATESBORO DIVISION

JAMES W. SIKES AND FELIX KEMP, INDIVIDUALLY AND ON BEHALF OF ALL OTHER PERSONS SIMILARLY SITUATED,	*	No. CV692-147
Plaintiffs,	*	
vs.	*	
AMERICAN TELEPHONE AND TELEGRAPH COMPANY,	*	
Defendants.	*	

ORDER

(Filed Aug. 7, 1997)

Defendant American Telephone and Telegraph Company ("AT&T") has filed objections to that portion of magistrate Judge G.R. Smith's Order of March 24, 1997, granting Plaintiffs' motion to compel AT&T to produce revenue documents and call detail records in computer format. This Order will be set aside only if it is "clearly erroneous or contrary to law." 28 U.S.C. §636(b) (1) (A); Fed.R.Civ.P. 72(a). As set out below, I find that Magistrate

Judge Smith's ruling was not clearly erroneous or contrary to law. Accordingly, it is hereby **AFFIRMED**.

In their motion to compel, Plaintiffs objected to AT&T Producing paper copies and microfiche of its revenue documents and call detail records. Magistrate Judge Smith, having found that AT&T had sent similar records in computer format to Direct American Marketers and Teleline, Inc., ordered AT&T to produce these records and documents in computer format.

According to AT&T, the Magistrate wrongly assumed that AT&T maintains its call detail information in the same computer format in which this information was provided to Teleline. AT&T argues that Magistrate Judge Smith's ruling overlooks an order relating to preservation of evidence entered on October 8, 1992, in the companion cases *Andrews v. AT&T* (CV 191-175) and *Harper v. AT&T* (CV192-134). In said order, Magistrate Judge Dunsmore acknowledged AT&T's duty to preserve its call detail records but accorded it latitude as to the form of that preservation. AT&T contends that, as permitted by the order, it downloaded this information on microfiche and has permanently maintained it in that fashion rather than on computer tape. AT&T reasons that because it was relying upon this order, "Plaintiffs cannot at this late date impose a duty upon AT&T to produce information in a format which they know, by Court Order, is different from the format in which AT&T was permitted to maintain such information."

I find that AT&T has ascribed too much weight to Magistrate Judge Dunsmore's order in *Andrews* and *Harper*. AT&T is correct that it was *authorized* to download these records onto microfiche so that the computer

tapes could be recycled. However, the Magistrate's obvious intention was to balance Plaintiffs' need for the evidence against the telephone companies' interest in avoiding costly preservation procedures. The Magistrate did no more than rule that AT&T could *for its own convenience* transfer its call detail records to microfiche. Accordingly, I find that the evidence preservation order does not exempt AT&T from now having to produce these records in computer format.

Although the original records apparently no longer exist, I am confident that a computer program can be designed that will extract the relevant data from AT&T's existing computerized records. If this is impossible, AT&T must reconvert the microfiche to computer format.

This brings me to AT&T's objection that Plaintiffs' request for computerized call detail records is duplicative of discovery they have already received from Teleline. While I find that AT&T must produce these call detail records in computer format, I recognize that Plaintiffs could be imposing on AT&T an unnecessary and potentially considerable expense. Plaintiffs concede that they have been "able to obtain most of the relevant call detail computer data from third parties, principally Teleline." I am reluctant to impose the expense of production on AT&T if Plaintiffs already have the information they seek. Thus, although AT&T is directed to produce these records in computer format, it should keep a careful accounting of the expenses incurred. Later, if AT&T desires to challenge this production as duplicative, an independent expert shall be appointed to determine whether the records produced by AT&T in computer format are *substantially similar* (it is not necessary that they be identical) to those records Plaintiffs have obtained from Teleline and other sources. If

these records are in fact substantially similar, Plaintiffs' counsel shall be required to reimburse AT&T for the costs incurred as set out in AT&T's accounting.

ORDERED ENTERED at Augusta, Georgia, this 7th day of August, 1997.

/s/ Dudley H. Bowen, Jr.

UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
STATESBORO DIVISION

JAMES W. SIKES, INDIVIDUALLY, AND ON BEHALF OF ALL OTHER PERSONS SIMILARLY SITUATED, Plaintiff, v. TELELINE, INC., AMERICAN TELEPHONE AND TELEGRAPH COMPANY, AND U.S.A. NETWORK, Defendants.	CIVIL ACTION FILE NO. 692-147 CLASS ACTION

DEFENDANT AMERICAN TELEPHONE & TELEGRAPH COMPANY'S RESPONSE TO RULE 8.6 INTERROGATORIES

American Telephone & Telegraph Company ("AT&T") responds to the interrogatories required by Rule 8.6 of the United States District Court for the Southern District of Georgia as follows:[1]

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[1] AT&T's responses herein are based on information known to AT&T at this time. AT&T has made a good faith effort to provide substantive responses. However, following discovery in this case, it may be necessary for AT&T to supplement one or more of its responses based on new information. Therefore, AT&T reserves its right to supplement these responses as may become necessary.

1.

If the Defendant is improperly identified, give its proper identification and state whether or not you will accept service on an amended summons and complaint reflecting the information furnished by you in answer hereto?

Answer: AT&T is properly identified.

* * *

5.

State the full names, addresses and telephone numbers of all lay witnesses whose testimony you may use in the trial of this case and describe the issues to which that testimony will relate.

Answer: At this time, AT&T has not determined which witnesses it may use in the trial of this matter. AT&T will supplement this response when such a determination is made.

6.

Identify by full name, address and telephone number each person whom you expect to call as an expert witness at the trial of this case and, as to each expert so identified, state the subject matter on which the expert is expected to testify, the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

Answer: At this time, AT&T has not identified any expert witnesses whom it expects to use at trial. AT&T

will supplement this response when and if an expert is selected.

* * *

8.

Do you wish this case to be tried jury or non-jury?

Answer: Non-jury.

This 28th day of January, 1993.

KNOX & ZACKS

/s/ Ted H. Clarkson
WYCK A. KNOX, JR.
GA Bar No. 427300
TED H. CLARKSON
GA Bar No. 129002

Post Office Box 2043
Augusta, Georgia 30903
706/724-2622
OF COUNSEL:
William N. Withrow, Jr.
GA Bar No. 772350
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Suite 5200
Atlanta, Georgia 30308-2216
404/885-3000

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
STATESBORO DIVISION

JAMES W. SIKES AND FELIX KEMP, INDIVIDUALLY AND ON BEHALF OF ALL OTHER PERSONS SIMILARLY SITUATED,	:	CIVIL ACTION FILE NO. CV 692-147
Plaintiffs,	:	
v.	:	
AMERICAN TELEPHONE AND TELEGRAPH COMPANY,	:	
Defendant.	:	(Filed March 10, 1997)

PLAINTIFFS' SUPPLEMENTAL RULE 8.6
INTERROGATORIES AND RESPONSES

1. State with particularity what you contend the Defendant did or failed to do which entitled you to obtain the relief in this action.

RESPONSE: AT&T is an interchange carrier which provided "900" number telecommunications, billing and collection services to promoters such as Teleline, Inc., pursuant to billing services agreements. AT&T also participated in the drafting of the solicitation ads, the game rules and the message heard by callers to the Let's Make a Deal 900-Number Game. AT&T provided and operated the computerized telephone answering machines that received calls to the 900-number game, played the game, determined winners and losers and captured the identity of the caller and the length of the call for billing purposes. The Let's Make A Deal 900-Number Game is a scheme or

artifice to defraud and obtain money by means of false, fraudulent pretenses, representations and promises. AT&T contributed in the operation of this illegal scheme and enterprise.

* * *

3. State the full names, addresses and telephone numbers of all lay witnesses whose testimony you may use at the trial of this case and describe the issues to which their testimony will relate.

RESPONSE:

James W. Sikes 10 West Liberty Street Claxton, Georgia 30417-2042	Plaintiff
Craig Sikes 10 West Liberty Street Claxton, Georgia 30417-2042	Minor son of Plaintiff
Felix Kemp 2304 Shadowood Drive Augusta, Georgia 30906	Plaintiff
Robert Lorsch 1640 South Sepulveda, Suite 500 Los Angeles, California 90025	the operation of the Let's Make A Deal 900-Number Game
Trish Bruns 2129 North Pine Orange, California 92665	Account Executive Multiquest 900 Services of AT&T

Larry Harris Carol Knauff 6 Green Hills Road Mendham, New Jersey	AT&T employee Product Line Director for AT&T including Multiquest 900 Services
Sean Hickey	Former AT&T employee
Linda Wilson	AT&T employee
Pat Lindblad	AT&T employee
Louis Delery 900 Route 202-206 North Bedminister, New Jersey	General Manager of Multiquest 900 Services of AT&T
Anthony Brown 16881 Hale Avenue Irvine, California 92714	Chief Executor Office of Direct American Marketers, Inc. Handled direct mail solicitations for the Let's Make A Deal 900- Number Game
Lynn Adams 342 Bellino Drive Pacific Palisades, CA 90272	Product Manager for Multiquest 900 Services of AT&T

4. Identify by full name, address, and telephone number each person whom you expected to call as an expert witness at the trial of this case and, as to each expert so identified, state the subject matter on which the expert is expected to testify, the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

RESPONSE: Plaintiffs have retained the following experts:

a) George Zinkahn, University of Georgia, Department of Marketing and Distribution, 148 Brooks Hall, Athens, GA 30602. (706) 542-3757. Dr. Zinkahn is expected to testify with regard to advertising, marketing, and consumer behavior relating to the various Let's Make a Deal advertisements. His Opinion will be based upon evidence he has reviewed in connection with this case and his understanding of how consumers typically respond to such materials. It will also be based upon his knowledge of advertising and how it works.

Dr. Zinkahn's testimony will cover the following area: a) impressions and beliefs that consumers might take away from the Let's Make It Deal commercial materials; b) ad elements (e.g, sounds, headlines) and how these work to create consumer impressions and beliefs; c) differences between the television game and the telephone game (as they are reflected in the commercials and infomercials); d) targeting issues (e.g., who might be exposed to commercial materials such as these); and, e) differences between promotions and games.

b) Mike Prounis, Prounis Consulting Group, Inc., 23-10 43rd Avenue, Long Island City, New York 11101. (718) 433-2300. Mr. Prounis is expected to testify with regard to how the class members in this litigation will be identified and reimbursed for their telephone calls made to the Let's Make A Deal 900-Number Game. His opinion will be based upon the computerized call detail records prepared by AT&T, the computer tape produced by Direct American Marketers, Inc. and reference data bases prepared by

Nynex that he has reviewed in connection with this case and his knowledge and background in computers.

c) C. Ronald Ellington, J. Alton Horsch Professor of Law, University of Georgia School of Law, Athens, Georgia 30602. (706) 542-5215. Mr. Ellington is expected to testify with regard to attorney fees. His opinion will be based upon evidence he has reviewed in connection with this case. He is expected to testify that Plaintiffs should receive a fee based upon a percentage of the money collected for the class plus expenses incurred.

d) Lewis Smith, Certified Public Accountant, Smith G. Harrison, Knox Shopping Center, 139 Nassau Place, Thomson, Georgia 30824. (706) 595-7992. Mr. Smith is expected to testify with regard to the monies billed, collected and retained by AT&T in connection with the Let's Make A Deal 900-Number Game. He is expected to summarize the data of AT&T and Teleline concerning monies billed and collected from those who called the Let's Make A Deal 900-Number Game.

e) David Wynn, Optisource Technologies, Inc., 405 S. Harbor Boulevard, Santa Ana, California 92704. (714) 433-2980. Mr. Wynn reviewed the computer reels containing call detail data from AT&T, transferred it onto CD rams, and created a software to enable Plaintiffs' counsel to view the data. Mr. Wynn is expected to testify as to the mechanics of the work he performed.

5. If you contend that you have been injured or damaged, describe such injuries and damages in detail and list the elements of damages for which you contend you are entitled to recover and the measure by which you contend the same should be computed.

RESPONSE: Plaintiff James Sikes was charged a total of $569.35. Plaintiff Felix Kemp was charged a total of $115.05. The total damages to the class are approximately $19,000,000.00 based on evidence produced by the Defendant and by its co-venturer, Teleline. Plaintiffs seek treble damages, cost of litigation and attorney's fees pursuant to 18 U.S.C. §1964. Plaintiffs also seek exemplary damages, the measure of which is the enlightened conscious [sic] of impartial jurors. Plaintiffs also seek to recover expenses of litigation and attorney fees. Expenses advanced by counsel for the Plaintiff class presently exceed $645,000.00.

* * *

8. Do you wish for this case to be tried by jury or nonjury?

RESPONSE: Plaintiff requests trial by the Court.

Respectfully submitted,

/s/ John G. Bill, Jr.
John G. Bill, Jr.
Georgia State Bar #048600
Pamela S. James
Georgia State Bar #389015
James L. Bentley, III
Georgia State Bar #052876
BELL & JAMES
Post Office Box 1547
Augusta, Georgia 30903
(706) 722-2014

Arthur R. Miller
1545 Massachusetts Avenue
Cambridge, Massachusetts 01238

John B. Long
Thomas W. Tucker
DYE, TUCKER, EVERITT,
WHEALE & LONG
453 Greene Street
Augusta, Georgia 30901

Account Number	Bill Date	Payment Due Date
177-568-3410 653	OCT 01 1990	PAYABLE UPON RECEIPT

[LOGO] AT&T

Summary of Charges	BILLING INQUIRIES CALL – 1 800 323-6672 TO PLACE AN ORDER CALL – 1 800 222-0400

ACCOUNT STATUS

TOTAL AMOUNT OF LAST BILL	288,820.17CR	
PREMIUM PAID FROM LAST BILL	288,820.17	THANK YOU FOR CHOOSING AT&T
BALANCE	.00	AT AT&T, EVERY CUSTOMER COUNTS.
CURRENT CHARGES	227,644.68CR	
CREDIT ACCOUNT BALANCE	$227,644.68CR	
(CHECK TO FOLLOW – DO NOT PAY)		

TOTAL CURRENT CHARGES – AT&T MultiQuest™ SERVICE

Charges	Amount	Subtotal
MONTHLY SERVICE – OCT 01 THRU OCT 31		
AT&T MultiQuest	2,000.00	
AT&T MultiQuest TOTAL ADJUSTED PREMIUM	354,585.98CR	

		352,585.98CR
AT&T TOTAL TARIFF/ REFUND CHARGES	86,118.95	
		86,118.95
BILLING SERVICES CHARGE (10.00%)	35,458.59	
		35,458.59
OTHER CHARGES AND CREDITS	5,705.36CR	
		5,705.36CR
MUNICIPAL UTILITY TAX SURCH	224.05	
IL PUC SURCHARGE	4.35	
		228.40
FEDERAL TAX	2,658.42	
STATE TAX	6,190.30	
		8,840.72
TOTAL CURRENT CHARGES		227,644.68CR

* * *

Account Number	Bill Date	Payment Due Date
177-568-3410 653	OCT 01 1990	PAYABLE UPON RECEIPT

[LOGO] AT&T

Detail of Service Usage	
MultiQuest USAGE CHARGES	Current Caller Charge: First Minute $2.00 Free Time Option: N Add'l Minute $1.00 Bill Designator:

MultiQuest NUMBER	DATES	RATE PERIOD
900 860-4005 PREMIUM	AUG 01 THRU AUG 31	DAY EVENING NIGHT TOTAL
TOTAL ATTEMPTS	**ATTEMPTS COMPLETED**	**TOTAL ELAPSED TIME (MIN)**
11,237	9,703	67,856
4,130	3,630	26,297
4,647	4,132	33,324
20,014	17,465	127,477

CHARGE DESCRIPTION	AMOUNT
PREMIUM AMOUNT	144,942.00CR
CALLER ADJUSTMENTS (2,710 CALLS/18,865.00 MIN.)	21,570.47
ADJUSTED PREMIUM AMOUNT	123,371.53CR
AT&T TARIFF CHARGE – INTERSTATE	26,337.15
AT&T TARIFF CHARGE - INTRASTATE	1,553.60
BILLING SERVICES CHARGE	12,337.15
REFUND CHARGE – INTERSTATE (2,495 CALLS/17,348.00 MIN.)	4,461.75
REFUND CHARGE – INTRASTATE (170 CALLS/1,240.00 MIN.)	318.50
ANI DELIVERY CHARGE (0 CALLS)	
NUMBER OF INEFFECTIVE ATTEMPTS – 2,549	
SUBTOTAL	$78,363.38CR

MultiQuest USAGE (PENDING)	Current Caller Charge: First Minute $2.00 Free Time Option: N Add'l Minute $1.00 Bill Designator:

MultiQuest NUMBER	DATES	RATE PERIOD
900 860-4005 PREMIUM	SEP 01 THRU SEP 30	DAY EVENING NIGHT TOTAL
TOTAL ATTEMPTS	**ATTEMPTS COMPLETED**	**TOTAL ELAPSED TIME (MIN)**
7,330	6,365	46,128
3,629	3,281	23,429
3,673	3,395	26,707
14,632	13,041	96,264

Account Number	Bill Date	Payment Due Date	[LOGO] AT&T
177-568-3410 653	OCT 01 1990	PAYABLE UPON RECEIPT	

Detail of Service Usage

MultiQuest USAGE CHARGES	Current Caller Charge: First Minute $2.00 Free Time Option: N Add'l Minute $1.00 Bill Designator:

MultiQuest NUMBER	DATES	RATE PERIOD
900 860-4332 PREMIUM	AUG 01 THRU AUG 31	DAY EVENING NIGHT TOTAL

TOTAL ATTEMPTS	ATTEMPTS COMPLETED	TOTAL ELAPSED TIME (MIN)
35,258	30,987	126,327
11,898	11,546	46,065
7,647	7,408	31,367
54,803	49,941	203,759

CHARGE DESCRIPTION	AMOUNT
PREMIUM AMOUNT	253,700.00CR
CALLER ADJUSTMENTS (5,569 CALLS/17,480.00 MIN.)	23,036.80
ADJUSTED PREMIUM AMOUNT	230.663.20CR
AT&T TARIFF CHARGE – INTERSTATE	46,713.45
AT&T TARIFF CHARGE – INTRASTATE	2,074.90
BILLING SERVICES CHARGE	23,066.32
REFUND CHARGE – INTERSTATE (5,100 CALLS/15,889.00 MIN.)	4,227.25
REFUND CHARGE – INTRASTATE (432 CALLS/1,514.00 MIN.)	400.10
ANI DELIVERY CHARGE (0 CALLS)	
NUMBER OF INEFFECTIVE ATTEMPTS – 4,862	
SUBTOTAL	$154,181.18CR

MultiQuest USAGE (PENDING)

Pending Caller Charge:
First Minute $2.00
Free Time Option: N
Add'l Minute $1.00
Bill Designator:

MultiQuest NUMBER	DATES	RATE PERIOD
900 860-4332 PREMIUM	SEP 01 THRU SEP 30	DAY EVENING NIGHT TOTAL

TOTAL ATTEMPTS	ATTEMPTS COMPLETED	TOTAL ELAPSED TIME (MIN)
27,880	27,200	108,207
11,263	11,097	42,997
5.438	5,387	20,753
44,581	43,684	171,957

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
STATESBORO DIVISION

JAMES W. SIKES, individually and on behalf of all other persons similarly situated,	)	
Plaintiffs,	)	CIVIL ACTION FILE
v.	)	No. CV 692-147
AMERICAN TELEPHONE AND TELEGRAPH COMPANY,	)	
Defendant.	)	

AT&T CORP.'S MOTION FOR RECONSIDERATION AND CLARIFICATION OF COURT'S AUGUST 7, 1997 ORDER COMPELLING AT&T TO CONVERT MICROFICHE RECORDS TO COMPUTER

As this Court is aware, Plaintiffs have requested that AT&T Corp. ("AT&T") produce certain call detail records in computer format. AT&T, however, in the normal course of its business and pursuant to an October 8, 1992 order relating to the preservation of evidence entered in the companion cases *Andrews v. AT&T* (CV 191-175) and *Harper v. AT&T* (CV 192-134), downloaded this information onto microfiche and has permanently maintained it on microfiche rather than on computer tape. On August 7, 1997, the Court affirmed Magistrate Judge G.R. Smith's March 24, 1997 order which granted Plaintiffs' motion to compel AT&T to produce call detail records in computer format. In doing so, the Court expressly held that, if AT&T was unable to extract the relevant data from AT&T's existing

computerized records, it would have to "reconvert the microfiche to computer format." (August 7, 1997 Order at 3).

AT&T has determined that the requested information cannot be retrieved from its existing computerized records and that, instead, the microfiche is the only available source of such information. Moreover, since the date of the Court's order[1], AT&T has determined that the only

* * *

In light of the enormous costs involved in this undertaking, AT&T respectfully requests that the Court reconsider its August 7, 1997 Order compelling AT&T to convert such information to computer at this time. Specifically, AT&T asks that the Court revise its Order so that AT&T is not required to convert such information unless, and until, Plaintiffs prevail on the merits of their claims. This delay in the conversion of this information onto computer will not prejudice Plaintiffs or negatively impact the prosecution of their claims in this action. Since the Court has not required that individual notice be given in this action, there is no need to identify class members (and hence, convert the call detail data) unless, and until, Plaintiffs

[1] Following the receipt of the Court's August 7, 1997 Order, counsel for Plaintiffs and AT&T discussed what information Plaintiffs contended was missing from the magnetic tapes they had received from Teleline as well as the fact that they had been unable to retrieve information from

* * *

actually prevail on their claims.[3] In the event AT&T prevails, there would be no need for conversion of this information since there would be no need to identify class members.

Nor is conversion of this information needed in order to assess or calculate damages in this case. Of course, there will be no need to calculate damages if AT&T prevails in this action. Even if, however, Plaintiffs were to prevail in this claims [sic], the information contained on the call detail report would not establish damages. Indeed, as Plaintiffs must concede, the data contained on the call detail reports does nothing other than identify an amount billed to a particular telephone number. It does not establish that any class member in fact paid for a call, how much a class member paid for a call, or whether the class member received a refund. At most, the call detail data may be useful in establishing the gross revenues for the Let's Make A Deal 900-number program. It is not, however, necessary to have this information converted to a computer data base in order to establish the gross revenues. AT&T will review its records before trial and provide Plaintiffs with a summary of the gross amounts which were billed for calls to the Let's Make A Deal 900-number program.[4] Beyond this, there is simply no need for this information at this time.

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[3] AT&T continues to contend, however, that due process required that individual notice be given.

[4] The parties intend to stipulate to this number. Plaintiffs have provided AT&T with their calculation of gross revenues and AT&T will either confirm or adjust this number based on its review of its records.

Because of the enormous costs involved in converting this information to a computer format, AT&T respectfully requests that the Court reconsider its August 7, 1997 Order compelling AT&T to convert such information and that the Court order such conversion only in the event, and not until, Plaintiffs prevail on the merits of their claim and Plaintiffs seek to distribute any damage award to class members.

Additionally, AT&T requests that the Court clarify a portion of its Order. AT&T has informed Plaintiffs that if it prevails in this action, it will seek to have the costs associated with any conversion of the microfiche call detail data onto computer imposed upon Plaintiffs pursuant to Fed. R. Civ. P. 54. Plaintiffs, however, have expressed the opinion that the Court's August 7, 1997 Order *precludes* the imposition of such costs upon Plaintiffs except in the event that the records converted by AT&T duplicate computer records previously provided to Plaintiffs by third parties.

Clearly, the Court's August 7, 1997 order provides that AT&T might recover its costs associated with converting data which is "substantially similar" to that already in Plaintiffs' possession. (Order at 4). However, AT&T does not interpret the Court's Order as precluding the recovery of costs associated with a non-duplicative conversion in the event AT&T is the "prevailing party" as provided by Fed. R. Civ. P. 54(d)(1). In light of this disagreement, the enormous expense involved in this conversion, and the very real possibility that AT&T will prevail on the merits of Plaintiffs' claims, AT&T asks that the Court clarify its

Order relating to the recovery of the costs of such conversion, prior to AT&T incurring such costs.

* * *

LET'S MAKE A DEAL TELEPHONE GAME MASTER SCRIPT

p0.1 [Preamble]

Monty: *[Mx]* Hi, I'm Monty Hall. Welcome to the Let's Make A Deal Telephone game.

Paula: Now you have a chance to win $2000. To go right into the game press 1 now. Let's Make A Deal is brought to you by Teleline Inc. at a cost of $3.88 per minute and an average length per call of 6 minutes. If you do not want to play hang up now.

p1.1 [General greeting]

Monty: *[Mx]* Now you have a chance to win great cash prizes at every level – all the way up to $2000! That's right friends. If you reach the top level of the game, you can win $2000, instantly – right on this call. And if you win the $2,000 Grand Prize, you can receive your prize on the next business banking day. That's right – you can be $2,000 richer on the next business banking day! So let's get ready to play

p1.2 [New York Greeting]

Paula: *[Mx]* Welcome to the Let's Make A Deal Telephone game for residents of New York State. Now you've got the chance to win great prizes and now here's your host Monty Hall.

Monty: Now you have a chance to win great cash prizes at every level – all the way up to $2000! That's right friends. If you reach the top level of the game, you can win $2000, instantly – right on this call. And if you win the $2000 Grand Prize, you can receive your prize on the next business banking day. That's right – you can be $2,000

richer on the next business banking day! So let's get ready to play.

Paula: Please be aware that your local telephone company's guidelines set a limit of two calls per day to the Let's Make A Deal telephone game.

p 1.3 [Florida Greeting]

Paula: *[Mx]* Welcome to the Let's Make A Deal Telelphone game for residents of the state of Florida. Now you've got the chance to win great prizes and now here's your host Monty Hall.

Monty: Now you have a chance to win great cash prizes at every level – all the way up to $2000! That's right friends. If you reach the top level of the game, you can win $2000, instantly – right on this call. And if you win the $2,000 Grand Prize, you can receive your prize on the next business banking day. That's right – you can be $2,000 richer on the next business banking day! So let's get ready to play.

pl.4 [NYNEX Non-NY Greeting]

Monty: *[Mx]* Now you have a chance to win great cash prizes at every level – all the way up to $2000! That's right friends. If you reach the top level of the game, you can win $2000, instantly – right on this call. And if you win the $2,000 Grand Prize, you can receive your prize on the next business banking day. That's right – you can be $2,000 richer on the next business banking day! So let's get ready to play.

Paula: Please be aware that your local telephone company's guidelines set a limit of two calls per day to the Let's Make A Deal telephone game.

p2.1 [TT Phone]

Paula: If you have a touchtone phone and wish to continue, press 1 now!

p2.2 [Non-tone msg.]

Paula: I'm sorry. But you need a touch-tone phone to play Let's Make A Deal.

p2.3 [Age]

Paula: Before we bring you down on stage to "make a deal" with Monty Hall, we'd like you to give us some information. Please enter your age – or any two digit number.

p2.4 [Gender]

Paula: Press 1 if you're male, press 2 if you're female.

p2.5 [Rules part 1]

Paula: *[Mx]* Now here's how you play. Listen carefully. You can play Lets Make A Deal twice with every call.

Paula: And remember there is a limit of two prizes per day per household. Monty Hall will ask you a question. Answer it correctly and you'll have the opportunity to choose what's behind the door. If you select the right door, you'll have a chance to claim that prize and leave the game. Or if you can make a deal with Monty and keep playing to try for another prize by choosing what's behind the doors at the next level. But be careful, because if you try for a bigger prize, you may not get it.

p2.6 [Rules part 2]

Paula: *[Mx]* If you've played before, you can go right into the game by pressing 1 on your telephone. If you get all the way up to level 6 and choose the right prize door, you'll get to keep that prize, anytime you choose the wrong door, you're out of the game. For a written copy of the complete rules, send a stamped, self-addressed envelope to Let's Make A Deal, 8306 Wilshire Boulevard, Suite 7071, Beverly Hills, CA 90211. That's Let's Make A Deal, 8306 Wilshire Boulevard, Suite 7071, Beverly Hills, CA 90211. Residents of Washington State and Vermont need not include return postage. Now it's your turn to play Lets Make A Deal.

p3.1 [Area code]

Monty: Thank You. Friends, I'd love to know a little bit about people who are playing, so please enter your area code. We'll also need this information in order to send you your prize so please enter the correct area code!

p3.2 [Telephone]

Monty: Remember we need your correct number in order for you to claim any prize you win. So please enter your telephone number.

p3-3 [Confirm phone]

Monty: Your telephone number is:

p3.4 [Phone correct or not]

Monty: Press 1 if that's correct, press 2 if it is not.

p4.1 [Trivia Intro]

Monty: On TV, I used to ask contestants if they had an unusual object. Of course, I can't do that now, so instead, I'm going to ask you a question. Ready?

p4.2 [Right Trivia Answer]

Monty: You're right!

p4.3 [Wrong Trivia Answer]

Monty: *[fx]* Oh, I'm sorry. That's the wrong answer. The correct answer was . . .

p4.4 [Another question]

Paula: Monty, let's give the player another chance to win that two thousand dollars? Why don't you ask another question?

p5.1.1 [Door menu, level 1]

Monty: *[fx]* Now there are 3 doors up on the stage with me. Behind one of those doors is a valuable prize. Which door do you choose. Press 1, 2 or 3.

p5.1.2 [Door menu, level 2]

Monty: *[fx]* Now we're on the second level. Behind one of the 3 doors is a valuable prize.

Paula: And Monty, that prize is twenty-five dollars in cash!

Monty: Which door do you choose? Press 1, 2 or 3.

p5.1.3 [Door menu, level 3]

Monty: *[fx]* Okay, we're on the third level. Behind one of the 3 doors is a valuable prize.

Paula: And Monty, that valuable prize is thirty-five dollars in cash!

Monty: Which door do you choose? Think about it. Press 1, 2 or 3.

p5.1.4 [Door menu, level 4]

Monty: *[fx]*This is the fourth level. Behind one of the doors is a valuable prize.

Paula: And Monty, that prize is now SEVENTY-FIVE dollars in cash! Seventy-five dollars!

Monty: This time, you have four doors to choose from. So think carefully. Which door do you choose? Press 1, 2, 3 or 4.

p5.1.5 [Door menu, level 5]

Monty: *[fx]* Now you're on the fifth level. Behind one of these doors is a valuable prize.

Paula: Monty, behind one of those doors is two hundred dollars in cash! Two hundred dollars!

Monty: But remember, now you have five doors to choose from. So think carefully. Which door do you choose? Press 1, 2, 3, 4 or 5.

p5.1.6 [Door menu, level 6]

Monty: *[fx]* This is it – level six. The top level of the game. Behind one of these doors is two thousand dollars in cash! That's right. Pick the right door here and I'll give you two thousand dollars. But remember, there are five doors to choose from. So think about it. Which door do you choose? Press 1, 2, 3, 4 or 5.

p5.2.1 [Win message 1]

Monty: *[mx]* Congratulations. You chose the right door. Now here's Jane to tell you what you've chosen.

p5.2.2 [Win message 2]

Monty: *[mx]* Very smart – you chose the right door! Here's Jane to tell you what's behind it.

p5.2.3 [Win Message 3]

Monty: *[mx]* Let's see – yes! That's the right door. Here's Jane to tell you what you've chosen.

p5.2.4 [Win Message 4]

Monty: *[mx]* Well, what can I say but – you chose the right door! Here's Jane to tell you what's behind it!

p5.4.1 [Disclose prize, level 1 var. 1]

Paula: *[fx]* You chose the door that had fif*teen* dollars behind it! Your first level prize is five . . . ten . . . fifteen dollars, which will be paid to you the player, in the form of a check! Congratulations from Let's Make A Deal!

p5.5.1 [Disclose prize, level 1 var. 2]

Paula: *[fx]* Behind the door is a bag full of shiny copper pennies – totalling fif*teen* dollars in cash! The prize will be paid to you, the player, in the form of a check made out to you, the player. Congratulations from Let's Make A Deal!

p5.6.1 [Disclose prize, level 1 var. 3]

Paula: *[fx]* It's fif*teen* dollars in cash! The prize will be paid to you, the player, in the form of a check made out to you, the player. Congratulations from Let's Make A Deal!

p5.7.1 [Disclose prize, level 1 var. 4]

Paula: *[fx]* It's a bag full of shiny nickels – worth fifteen dollars in cash! The prize will be paid to you, the

player, in the form of a check made out to you, the player. Congratulations from Let's Make A Deal!

p5.4.2 [Disclose prize, level 2 var. 1]

Paula: *[fx]* You chose the door that had twenty-five dollars behind it! Your second level prize is five . . . ten. . . . fifteen. . . . twenty-five dollars, which will be paid to you, the player, in the form of a check! Congratulations from Let's Make A Deal!

p5.5.2 [Disclose prize, level 2 var. 2]

Paula: *[fx]* It's an envelope – with twenty-five dollars cash in it! The prize will be paid to you, the player, in the form of a check! Congratulations from Let's Make A Deal!

p5.6.2 [Disclose prize, level 2 var. 3]

Paula: *[fx]* It's a twenty dollar bill – and a five dollar bill! That adds up to twenty-five dollars! The prize will be paid in the form of a check made out to you the player! Congratulations from Let's Make A Deal!

p5.7.2 [Disclose prize, level 2 var. 4]

Paula: It's a stack of one dollar bills – that adds up to twenty-five dollars! Your twenty-five dollar prize will be paid to you, the player, in the form of a check! Congratulations from Let's Make A Deal!

p5.4.3 [Disclose Prize, level 3 var. 1]

Paula: *[fx]* You chose the door that had thirty-five dollars behind it! Your third level prize is not ten, not twenty, not thirty – but thirty-five dollars, which will be paid to you, the player, in the form of a check! Congratulations from Let's Make A Deal!

p5.5.3 [Disclose prize, level 3 var. 2]

Paula: *[fx]* It's a handful of dollar bills – that totals thirty five dollars! The prize will be paid to you, the player, in the form of a check! Congratulations from Let's Make A Deal!

p5.6.3 [Disclose prize, level 3 var. 3]

Paula: *[fx]* It's thirty-five dollars in cash! The prize will paid to you, the player, in the form of a check! Congratulations from Let's Make A Deal!

p5.7.3 [Disclose prize, level 3 var. 4]

Paula: *[fx]* It's a stack of one dollar bills – thirty five of them in all! That adds up to thirty-five dollars in cash! That's a pretty nice sized stack, don't you think? The prize will [sic] paid to you, the player, in the form of a check! Congratulations from Let's Make A Deal!

p5.4.4 [Disclose prize, level 4]

Paula: *[fx]* You chose the door that had seventy-five dollars behind it! Your fourth level prize is twenty five – fifty – SEVENTY FIVE DOLLARS, which will be paid to you, the player, in the form of a check! Congratulations from Let's Make A Deal!

p5.1.5 [Disclose prize, level 5]

Paula: *[fx]* You've just won one hundred – TWO HUNDRED DOLLARS! That's right! Two hundred dollars, it's yours, Great going! The prize will be paid in the form of a check made out to you, the player! Once again, congratulations from Let's Make A Deal!

p6.2.1 [Keep or go to level 2]

Monty: *[fx]* Now it's time to make your decision. You can take your prize and leave the game now, or you can keep playing and try for a more valuable prize on the next level, level 2.

Paula: Monty, the prize on the next level is twenty-five dollars cash! Behind one of the doors on level two is twenty-five dollars cash.

Monty: But remember, one of the doors will have a bigger prize, but two of the doors will not. You want to risk what you've won? Press 1 if you want to keep your prize and quit now. Press 2 if you want to keep playing.

p6.2.2 [Keep or go to level 3]

Monty: *[fx]* Now listen, because once again you have to make a decision. Do you want to take your prize, or keep playing and try for a more valuable prize on the next Level, level 3?

Paula: Before you make your decision, listen to this: the prize on level 3 is thirty-five dollars in cash! There's thirty dollars in cash behind one of those three doors!

Monty: But remember, one of the doors will have that bigger prize, two of the doors will not. Do you want to risk what you've won to try for that larger prize? Press 1 if you want to keep your prize and quit now. Press 2 if you want to keep playing.

p6.2.3 [Keep or go to level 4]

Monty: *[fx]* Okay now, get ready because this is an awfully big decision. Do you want to take your

prize or keep playing and try for a more valuable prize on the next level, level four.

Paula: Monty, the prize on level 4 is $75! Seventy-five dollars in cash! Our callers could win 75 dollars if they choose the right door!

Monty: But now, there are four doors to choose from. One of the doors will have a valuable prize, but three of the doors will not. You want to risk what you've won? Press 1 if you want to keep your prize and quit now. Press 2 if you want to keep playing.

p6.2.4 [Keep or go to level 5]

Monty: *[fx]* Well you've come this far. Do you want to take your prize or keep playing and try for a more valuable prize on the next level, level five!

Paula: The next level is level 5, where the prize is $200 in cash! I'll say that again – the prize on level 5 is $200 cash!

Monty: But this time there are five doors to choose from. One of the doors will have that valuable prize, four of the doors will not. Now do you want to risk what you've won? Press 1 if you want to keep your prize and quit now. Press 2 if you want to keep playing.

p6.2.5 [Keep or go to level 6]

Monty: *[fx]* Well, here it is – your biggest decision. You've gotten all the way through level 5. You've won $200. Now, do you want to take your prize or keep playing and try for a more valuable prize on the next level? Remember: the prize on level 6 is the biggie – two thousand dollars!

Paula: And Monty, if our players decide to go on, and don't win that two thousand dollar prize, we'll still give them a consolation prize of $100!

Monty: But once again, there are five doors to choose from. One of the doors will have that valuable prize, four of the doors will not. Now do you want to risk what you've won? Press 1 if you want to keep your prize and quit now. Press 2 if you want to keep playing.

p6.3 [Decided to keep, var. 1]

Monty: You decided to keep your prize. *[Applause]* Here's Jane to tell you how to get it.

p6.4 [Decided to keep, var. 2]

Monty: Alright. You decided to keep your prize. *[Applause]* Well, it's been fun. Now here's Jane to tell you how to get that prize.

p6.5 [Decided to keep, var. 3]

Monty: Well I can't say I blame you. *[Applause]* You've got a terrific prize. And here's Jane to tell you how to get it.

p6.9 [Redemption instructions]

Paula: *[Mx]* Write your prize code on a 3-1/2 x 5 post card along with your name, address, telephone number; age and social security number. You must include your telephone number, age and social security number. Send your post card to Let's Make A Deal, 8306 Wilshire Boulevard, Suite 7071, Beverly Hills, CA 90211. That's Let's Make A Deal, 8306 Wilshire Boulevard, Suite 7071, Beverly Hills, CA 90211. Please allow 8 to 10 weeks for delivery. Now listen carefully: your postcard must be postmarked no later than 10

days after the date you played this game. If your postcard is postmarked more than 10 days after the date you played the game, you may forfeit your prize. Once again, send your post card to Let's Make A Deal, 8306 Wilshire Boulevard, Suite 7071, Beverly Hills, CA 90211.

p7.1 [Keep playing, var. 1]

Monty: *[applause]* Okay. You're still in the game!

p7.2 [Keep playing, var. 2]

Monty: *[applause]* Very good! You still want to keep playing.

p7.3 [Keep playing, var. 3]

Monty: *[applause]* Great. I'm glad you want to keep playing.

p7.4 [Keep playing, var. 4]

Monty: *[applause]* All right! You just made a deal to keep on playing.

p7.5 [Keep playing, var. 5]

Monty: *[applause]* Hey, that's great. You're still in the game

p8.1 [Tip 1]

Paula: And remember, when you're shopping for an airline ticket make sure you get all the details on the bargain fare you want. Some fares don't include extra costs for fuel and security surcharges. So make sure you ask.

p8.2 [Tip 2]

Paula: And remember, whenever you shop it's a good idea to read the labels far the product you want

to buy. You can get a lot of information about fat, calories and nutritional content of the product So before you buy, it's a good idea to read.

p8.3 [Tip 3]

Paula: And remember before you sign up for any bargain travel cruise offer, make sure you check to see that the low rate advertised includes everything like airfare, hotel and other fees. You may find out that the bargain isn't such a great deal and save yourself money and headache later on.

p8.4 [Tip 4]

Paula: And remember, you can play a part in helping protect and preserve our environment. All it takes is a little common sense. For example next time you buy furniture make sure the manufacturer isn't using wood from an endangered rain forest.

p9.1 [Redeem your prize]

Paula: Here's your prize code, be sure to write it down.

p9.2 [Prize Code is . . .]

Paula: Your prize code is . . .

p9.3 [Repeat prize code]

Paula: Press one to hear your prize code again.

p10.2 [Replay prompt]

Paula: Now, here's your second chance to win that two thousand dollar prize. So get ready to play another game of Let's Make A Deal with Monty Hall and have another crack at that two thousand dollar prize! Good luck and once again – here's Monty! *[applause]*

p11.1 [Copyright] 1046

Paul: *[Mx]* Thank you for playing Let's Make A Deal! And if you want to play again, be sure to call back at 1-900-860-4332! That's 1-900-860-4332! Let's Make A Deal telephone game is copyrighted 1991, Teleline, Inc., Beverly Hills, California. Program operated by Teleline.

p12.1 [Invalid response]

Monty: Well that's an invalid response. Please try again!

p13.1.1 [Wrong door, var. 1]

Monty: *[fx]* Oh, I'm sorry that's the wrong door. Here's Jane to tell you what you could have won.

p13.1.2 [Wrong door, var. 2]

Monty: *[fx]* Uh oh, that's the wrong door. Here's Jane to tell you what you could have won,

p13.1.3 [Wrong door, var. 3]

Monty: *[fx]* Oh, dear, you chose the wrong door. Here's Jane to tell you what you could have won.

p13.1.4 [Wrong door, var. 4]

Monty: *[fx]* Oh – you were so close! But you chose the wrong door. Here's Jane to tell you what you could have won.

p 13.3.1 [Could have won, level 1 var. 1]

Paula: You could have won our first level cash prize of fifteen dollars!

p13.4.1 [Could have won, level 1 var. 2]

Paula: *[fx]* You could have won our first level prize of fifteen dollars in cash!

p13.5.1 [Could have won, level 1 var. 3]

Paula: *[fx]* You could have won fifteen dollars in cash!

p13.6.1 [Could have won, level 1 var. 4]

Paula: *[fx]* You could have won five . . . ten . . . fiften [sic] dollars!

p 13.3.2 [Could have won, level 2 var. 1]

Paula: *[fx]* You could have won our second level cash prize of twenty-five dollars!

p13.4.2 [Could have won, level 2 var. 2]

Paula: *[fx]* You could have won twenty-five dollars in cash!

p13.5.2 [Could have won, level 2 var. 3]

Paula: *[fx]* You could have won twenty five one dollar bills!

p13.6.2 [Could have won, level 2 var. 4]

Paula: *[fx]* You could have won twenty five dollars!

p13.3.3 [Could have won, level 3 var. 1]

Paula: *[fx]* You could have won our third level cash prize of thirty-five dollars!

p13.4.3 [Could have won, level 3 var. 2]

Paula: You could have won thirty-five one dollar bills – thirty-five dollars!

p13.5.3 [Could have won, level 3 var. 3]

Paula: You could have won thirty-five dollars!

p13.6.3 [Could have won, level 3, var 4]

Paula: [fx] You could have won thirty-five one dollar bills. That adds up to thirty-five dollars!

p13.3.4 [Could have won, level 4]

Paula: *[fx]* You could have won our fourth level cash prize of seventy-five dollars!

p13.3.5 [Could have won, level 5]

Paula: *[fx]* You could have won our fifth level cash prize of two hundred dollars!

p13.7 [$2000 lose message]

Paula: You're not going away empty handed – you still won a consolation prize of $100! A check will be made out to you, the player! Congratulations from Let's Make A Deal!

p14.1 [$2000 Winner message, part 1]

Monty: Congratulations – you're absolutely right. You've won our top prize! And here's Jane to tell you what you've won, and how to get it.

Paula: *[fx]* Congratulations – You've just won $2000! WOW! You've hit the jackpot on this call. Now please listen carefully because I am going to assign you a special prize code. You must have this prize code in order to redeem you [sic] prize. Alright, please hold on, here is your prize code:

p14.3 [$2000 Winner message, part 2]

Paula: Now that you have your prize code, you can choose to redeem your prize by mail, a process which takes approximately 8 to 10 weeks; Or, you may qualify to get your $2000 prize on the next business day by calling a special toll-free

number and telling us your prize code number. Be sure to have a pencil ready when you call, because you will be asked to write down important information you must know in order to qualify to receive your prize on the next business day. You must call the toll-free number within the next 15 minutes to be eligible to receive your prize on the next business day. I'll repeat the number several times to make sure that you get it.

[the following paragraph changes monthly]

Paula: Ready – the number is 1-800-528-5676. To receive your prize on the next business day, you must call within the next 15 minutes. Again – that number is 1-800-528-5676. Do not give this number to anyone! It is your secret winner telephone number. Once again, the number is 1-800-528-5676. That's 1-800-528-5676. Call now!

Paula: If you choose to redeem your prize by mail, write your prize code on a 3 1/2 x 5 postcard along with your name, address, telephone number, age and social security number. You must include your telephone number, age and social security number or we cannot award your prize. Send your postcard to Let's Make A Deal, 8306 Wilshire Boulevard, Suite 7071, Beverly Hills, California 90211. That's Let's Make A Deal, 8306 Wilshire Boulevard, Suite 7071, Beverly Hills, California 90211. IMPORTANT: Your postcard must be postmarked no later than 10 days from today or you may forfeit the prize. I repeat: If your postcard is postmarked later than 10 days from today, you may forfeit the prize. Please allow eight to ten weeks for delivery of your prize. Once again, send your postcard to Let's Make A Deal, 8306 Wilshire Boulevard, Suite 7071, Beverly Hills, California 90211.

DIC 1

Who's the famous Cartoon Mouse with the large ears? Press 1 if it's Mickey Mouse. Press 2 if it's Popeye. Press 3 if it's Porky Pig.

DIC 2

What color is the white House? Press 1 if it's green. Press 2 if it's red. Press 3 if it's white.

DIC3

How many Musketeers were in the Three Musketeers? Press 1 if it was one. Press 2 if it was two. Press 3 if it was three.

DIC4

Name the president who's Buried in Grant's Tomb. Press 1 if it's Martin van Buren. Press 2 if it's Ulyssess S. Grant. Press 3 if it's Grover Cleveland.

DIC5

Who was the vice president before Dan Quayle? Press 2 if it was George Bush. Press 2 if it was John Nance Garner. Press 3 if it was Jimmy Carter.

DIC6

What's the name of the Holiday we celebrate on July 4th? Press 1 if it's Independence Day. Press 2 if it's Lincoln's Birthday. Press 3 if it's Labor Day.

DIC7

What is the name of the Reindeer with the shiny red nose? Press 1 if it is Flipper. Press 2 if it is Rudolph. Press 3 if it is Lassie.

DIC8

How many colonies were in the original 13 colonies? Press 1 if it was 13. Press two if it was 50. Press 3 if it was 42.

DIC9

The United States has how many states? Press 1 if it's 13. Press 2 if it's 25. Press 3 if it's 50.

DIC1O

Which one of these is not an ocean. Press 1 if it's the Atlantic Ocean. Press 2 if it's the Pacific Ocean. Press 3 if it's Lake Michigan.

DIC11

Which car was named after Henry Ford? Press 1 if it was a BMW. Press 2 if it was a Rolls Royce. Press 3 if it was a Ford.

DIC12

In which sport do they try to score a touchdown? Press 1 if it's baseball. Press 2 if it's football. Press 3 if it's horse racing.

DIC13

How many holes are open [sic] an 18 hole golf course? Press 1 if it's 18. Press 2 if it's 9. Press 3 if it's 25.

DIC14

Which president is pictured on a Lincoln Penny? Press 1 if it's Lincoln. Press 2 if it's Reagan. Press 3 if it's Jackson.

DIC15

Where did the New York World's Fair take place? Press 1 if it was Cleveland. Press 2 if it was Honolulu. Press 3 if it was New York.

DIC16

What color was Little Red Riding Hood's Hood? Press 1 if it was red. Press 2 if it was green. Press 3 if it was yellow.

DIC17

What is the name of the Queen of England? Press 1 if it's Goofy. Press 2 if it's Elizabeth. Press 3 if it's Irving.

DIC18

What kind of race is the Kentucky Derby? Press 1 for turtle. Press 2 for orangutang. Press 3 for horse

DIC19

The Lincoln Memorial is named for which President? Press 1 for Jimmy Carter. Press 2 for Abraham Lincoln. Press 3 for Grover Cleveland.

DIC20

What is the name of the little girl in Alice in Wonderland? Press 1 for Mary. Press 2 for Alice. Press 3 for Louise.

DIC21

The Washington Monument is named for which U.S. president? Press 1 for Gerald Ford. Press 2 for Richard Nixon. Press 3 for George Washington.

DIC22

Who went up the hill with Jack to fetch a pail of water? Press 1 for Lady Bird Johnson. Press 2 for Betty Boop. Press 3 for Jill.

DIC23

The Mexican Jumping Bean is named for which country? Press 1 for Mexico. Press 2 for Brazil. Press 3 for Argentina.

DIC24

What is the national bird of the United States? Press 1 for cuckoo. Press 2 for Eagle. Press 3 for yellow bellied sap sucker.

DIC25

Which member of the family gets a present on Mother's Day. Press 1 for brother in law. Press 2 for stepfather. Press 3 for Mother.

DIC26

The Kennedy Space Center is named for which President? Press 1 for Franklin Roosevelt. Press 2 for John F. Kennedy. Press 3 for James Monroe.

DIC27

How many dwarfs did Snow White befriend? Press 1 for a hundred and forthy [sic]. Press 2 for seven. Press 3 for fifty seven.

DIC28

What kind of sport is played at the Super Bowl? Press 1 for tiddlywinks. Press 2 for bowling. Press 3 for football.

DIC29

On what holiday would you send your sweetheart a Valentine? Press 1 for Ground Hog Day. Press 2 for Valentine's Day. Press 3 for Labor Day.

DIC30

In which city would you find the Brooklyn Bridge. Press 1 for Cleveland. Press 2 for Rome. Press 3 for London.

WINSTON & STRAWN

35 WEST WACHER DRIVE
CHICAGO, ILLINOIS 60601-9703

(312) 558-5600

—

FACSMILE (312) 558-5700
March 25, 1992

FREDERICK H. WINSTON
[ILLEGIBLE]
SILAS H. STRAWN
[ILLEGIBLE]
MARY HUTCHINGS
REED
(312) 558-6337

NEW YORK OFFICE
175 WATER STREET
NEW YORK, NY
[ILLEGIBLE]

—

WASHINGTON, DC.
OFFICE
5400 L STREET, N.W.
WASHINGTON, DC
20006-34
(202) 371-5700

By Federal Express

Mr. Robert Lorsch
Teleline, Inc.
5950 Wilshier Blvd.
2nd Floor
Los Angeles, California 90036

Re: *Let's Make A Deal*

Dear Bob:

This will confirm our opinion that "Let's Make A Deal" may be legally conducted in the United States without significant risk of enforcement except in Minnesota and possibly Georgia and New Jersey. Registration would be required prior to running the game in Louisiana.

We understand that "Let's Make a Deal is a game of chance which is played similarly to the syndicated television show of the same name over a 900-number. Television and print advertisements also offer consumers the opportunity to play by a mail-in method. Lotteries – which contain the elements of prize, chance and consideration – are illegal under state and federal law. Because the promotion involves prizes and chance, its legality turns on whether consideration is present. We believe the mail-in method of entry negates the third element of an illegal lottery – consideration – in most states, as described below. We further believe that the operation of and advertising for "Let's Make A Deal" substantially complies with the disclosure and other requirements of state laws in Illinois, Iowa, Louisiana, Maine, New Jersey, New York, Oregon, Virginia and Washington which regulate 900 number promotions.

1. U.S. Postal Service Regulations

In *Garden City Chamber of Commerce, Inc. v. Wagner,* 100 F. Supp. 769 (E.D.N.Y. 1951), *affirmed,* 192 F.2d 424 (2d Cir. 1951), the court reviewed a treasure hunt promotion in which consumers received a removable coupon in the mail bearing the same printed number as the card to which it was attached. The sender retained the coupon and after mailing the card to the Chamber of Commerce had to go to a downtown shopping area and move from store window to store window to find whether the number on his card corresponded to the winning number in the store window. The Postmaster maintained that the scheme was a lottery under §36.6 of the Postal Law and Regulations (1948). In reviewing the applicable federal lottery law, the court held that the effort involved in

inspecting a number of store windows was not the "substantial effort" required to constitute consideration.

In addition, the United States Postal Service has routinely issued no-action letters when asked to review promotions involving bottle cap or box top promotions in which participants enter either by making a purchase or by sending a self-addressed, stamped envelope for a free game piece to a designated address. These Postal Service no-action letters evidence a consistent policy that a free alternative mail-in method of entry cures a sweepstakes promotion where the other method of entry is thought to be a purchase. The Postal Service has announced that it will no longer review individual promotions for compliance with the postal statute and regulations.

2. Federal Communications Commission

The Federal Communications Commission has taken a position on the definition of a lottery similar to the United States Postal Service. In *F.C.C. v. American Broadcasting Co., Inc.*, 247 U.S. 284 (1954), the United States Supreme Court held that ABC's giveaway programs where prizes were distributed to home viewers selected by chance, *e.g.*, "Stop the Music," were not lotteries. The United States Supreme Court reiterated the three requirements for what constitutes a lottery: (1) distribution of prizes, (2) according to chance, (3) for consideration. The court held that the benefit to the promoter by soliciting home viewers did not constitute consideration under existing federal laws. In *Caples Company v. United States,* 243 F.2d 232 (D.C. Cir. 1957), in addition to watching a television bingo program, viewers were required to obtain bingo cards free form stores handling the sponsor's product.

This "Play Marko" game was held not to be a lottery since obtaining cards at sponsors' stores or outlets or listening to the program was not consideration under the federal statute prohibiting the broadcast of lotteries.

In 1976, The Federal Communications Commission issued an opinion in which it examined a California television station KCOP's programming, in general, and alleged lottery programming, in particular. The Commission concluded that certain enumerated activities alleged to constitute consideration and thus "lottery programming" were not, in fact, consideration. Such activities included: postage for postcard entries to drawing contests; watching television programs; giving up one prize for the chance of winning better prizes; writing for tickets in order to attend a program and be an audience participant; travelling to the T.V. station to be a participant and costs incurred thereby (parking fees, travel costs, mileage) travelling to a business establishment to register for a contest.

Basing its opinion on the holdings in *Caples* and *F.C.C. v. ABC* discussed earlier herein, the Commission concluded that the "contention that such actions constitute consideration are without merit." *In Re Application of KCOP Television, Inc.,* 59 F.C.C.2d 1321 (1976).

Clearly, the Federal Communications Commission has considered and rejected the notion that slight inconveniences, such as requiring a stamped self-addressed envelope, constitutes consideration.

The Federal Communications Commission has also issued a Public Notice concerning the applicability of the lottery statutes to contestants and sales promotions, F.C.C. 69-611, 18 F.C.C.2d 52 (1969). The Public Notice

cites *American Broadcasting Co., Inc., Caples Co.* and *Garden City Chamber of Commerce, supra,* as holding that the mere acts of appearing, registering, or securing free entries do not constitute consideration so long as the free chances were available on a basis "reasonably equal to that on which contestants who purchase a product may obtain them". 18 F.C.C.2d at 52. The FCC opinion stresses that free chances should be available at most customary retail outlets and that a non-purchaser should not be limited to one free chance when the purchaser may obtain as many as the number of products he or she purchases.

In the "Let's Make a Deal" game, participants can call a 900 number and then choose among three "doors." Behind one of the doors will be a prize of a specified value. If the participant chooses correctly, he or she may decide to keep the prize and end the game or play another round. By playing another round, the participant forsakes the previously-won prize. In all, there are six levels of play, with an increasing number of doors from which to choose. The entire set of rounds constitutes one play.

When a participant opts to use the free-entry method of play, he or she receives a paper "ballot" good for one play. The "ballot" contains five levels of doors, just like the phone version. The player marks a door on each level, and indicates whether at each level he or she wants to trade up. These paper "ballots" are judged by hand against the winning door numbers chosen for the day of judging, and prizes are awarded according to the same structure as the phone game. Both phone players and mail-in players are restricted to two plays per day. In effect, then, the free-entry participant has the same chances of winning a prize as a paying participant. The only difference is in the instantaneous satisfaction of a consumer's desire to play

the game, the deprivation of which does not constitute consideration under FCC rulings. Indeed, the FCC has specifically recognized the viability of a non-purchase alternative in bottle cap promotions which provide a write-in alternative for free bottle caps but do not provide the instant satisfaction of free caps at retail stores.

3. State 900-Number Laws

Illinois

Illinois Public Act 87-452 (1991) requires, *inter alia,* that advertisements for 900 numbers accurately state the charges for the call per call or per minute, any geographic or other limitations on the availability of the promotion, and a requirement that callers under 12 receive their parent's permission. Games of chance must promote gods or services, provide an alternative method of entry, have a prize pool independent of the number of calls or the revenue earned therefrom and list the sponsor's name, start and end dates, age restrictions and the availability of complete official rules. Illinois law also requires a free preamble which states the price of the call and provides an opportunity to disconnect.

Iowa

Under Iowa law, 1991 Ia. SF 317, a pay-per-call service must have an introductory disclosure message that identifies the total charge for the call on a per minute basis and the average length of call; in television commercials, these disclosures should be prior to providing the 900 number itself. A preamble and opportunity to disconnect are also required.

Louisiana

Louisiana has recently enacted legislation which requires 900-number promotions to be registered seven days prior to any advertising. The legislation became effective September 6, 1991. The filing fee is $150. Radio and television advertisements for a 900 number must state the price of the call (or average total price) in connection with the number and in the video the type size must be one-half the size of the largest telephone number shown. Print advertisements must also state the price of the call in type size at least one half the size of the largest telephone number. Whenever a number is shown in either a television or a print advertisement, the cost of the call must be displayed adjacent to the number. Your corporate name, address and telephone number must also appear in any advertisement for the promotion.

Recently, the Louisiana Attorney General challenged a 900-number fantasy football game on the grounds that it constituted gambling. However, in that instance the mail-in method of entry did not allow the consumer to play exactly the same game as the callers.

Maine

Maine's 900 number statute, 1991 Me. Ch. 524, deals with collection, blocking and complaint procedures, but not specifically with disclosures or advertising.

New Jersey

New Jersey's 900 number statute, Chapter 416, will become effective April 1. It requires that all advertisements disclose the cost per minute and average length of

the service, that minors obtain parental consent and the legal name and street address of the information service provider.

New Jersey's law also states that "it shall be an unlawful practice for a person to advertise or sell an information service that involves the participation in a contest, raffle, lottery or game of chance which is illegal under New Jersey law." In our view, a game of chance which provides for an alternative method of entry is legal in New Jersey and should not be prohibited by the statute. Nonetheless, the passage of the statute may portent a more conservative view of alternative methods in New Jersey and we will want to carefully monitor developments there.

New York

New York's statute, 1991 N.Y. Laws 495, requires that advertising disclose the cost of the call per minute in 10 point type.

Oregon

Oregon's law, 1991 Ore Laws 672, requires that the preamble of a 900 number message disclose the cost per minute, the average charge or if of unlimited duration, the cost per hour, and that the caller has an opportunity to disconnect. Advertisements must state the cost of the call each time the 900 number is given in the same size and typeface.

Texas

The Texas Attorney General challenged a 900-number promotion ostensibly because some people paid to enter. However, in that case there was no underlying product or service being promoted; the prize pool was entirely dependent on revenue from the 900 number.

Virginia

Virginia statues, tit. 59.1, chp 33, provides that advertisements for pay-per-call services must disclose the per-minute cost of the call and the average length of the call and the provider's name, business address and telephone number. Charges must also be disclosed at the beginning of each call, and there must be a period during which the caller may hang up without charge.

Washington

Washington Law, RCW 80.36.500, requires that a program preamble include the average cost and length of the call and offer an opportunity to hang up without charge. Advertisements must state the price of the call immediately before the 900 number is given; print disclosures must be in the same size and type. Interactive call services are not permitted for children under 18.

4. FCC and 900

On September 26, 1991 the Federal Communications Commission ("FCC") adopted rules that, in part, require information providers to supply a preamble disclosing the price of the call, the service and the name of the information provider. The rules also allow the caller to hang up

before charges are incurred. 47 C.F.R. §64.711 requires that the cost of the call be disclosed per minute in a preamble, which also describes the program, informs the caller as to when the charges will begin and offers an opportunity to disconnect, and allows consumers to bypass the preamble on subsequent calls. Services directed to children must disclose that parental permission is required.

5. Lottery Considerations

Minnesota

We recommend that you void the Promotion in Minnesota. Minnesota Statutes 1990, section 609.75, subdivision 1, which concerns the definition of an illegal lottery, was recently amended to define a 900 number method of entry to a promotion as consideration. The law states:

> **Subdivision 1. LOTTERY.** (a) A lottery is a plan which provides for the distribution of money, property or other reward or benefit to persons selected by chance from among participants some or all of whom have given a consideration for the chance of being selected. *A participant's payment for the use of a 900 telephone number or another means of communication that results in payment to the sponsor of the plan constitutes consideration under this paragraph.* (emphasis added)

We have been informed by a representative of the Minnesota Attorney General's office that the underlined sentence was meant by the legislature to make any promotion with a 900 number method of entry an illegal lottery regardless of whether there is an alternative free method of entry. We further understand that it is at best unclear whether the

Attorney General will enforce the statute against skill promotions. We perceive some risk in Minnesota, therefore, it is probably best to avoid this state for the time being.

Georgia

A 1984 Georgia Attorney General Opinion indicates that if some people pay consideration via a 900 number in order to determine whether they have won, a promotion is an illegal lottery. The opinion cites a 1937 case in which a "flexible participation" scheme was held to be illegal because some persons paid consideration in order to be eligible. *Barker v. State,* 56 Ga. App. 705 (1937). *Barker* was affirmed in *Boyd v. Piggly-Wiggly Southern, Inc.,* 115 Ga. App. 628 (1967) and cited with approval in *Monte Carlo Properties, Ltd. v. Webb,* ___ Ga. ___ (No. 41296, Nov. 6, 1984).

However, the opinion of an attorney general is not officially the law, and in fact we know of no actions by Georgia officials to judicially enforce it. Recently, McDonald's ran its "McMillions on NBC" promotion which included a 900 method of determining whether one had won. Certainly there have been many on-pack promotions conducted in Georgia in which many consumers bought a product to get a game piece, even though free pieces were available by mail, and we believe the Attorney General has not acted against any of these. Similarly, we believe the Georgia Attorney General should not act against your Promotion.

6. Conclusion

Based on our review of you game materials, we believe they substantially comply with the requirements discussed above, except in Minnesota. We believe Georgia and New Jersey pose acceptable levels of risk at this time.

Please call if you would like to discuss any of this further.

Sincerely,

/s/ Mary Hutchings Reed
Mary Hutchings Reed

cc: Stephen P. Durchslag

THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
STATESBORO DIVISION

JAMES W. SIKES, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS, VS. TELELINE, INC., AMERICAN TELEGRAPH AND TELEPHONE COMPANY, AND U.S.A. NETWORK, DEFENDANTS.	CERTIFIED COPY CIVIL ACTION FILE NO. CV 692-147 VOLUME 1 (PAGES 1-98)

DEPOSITION OF:

ROBERT H. LORSCH

THURSDAY, AUGUST 26, 1993

3:30 P.M.

* * *

[292] Q. At the time of that letter when Teleline was requested to provide file materials, in your view was Teleline in compliance with all program content guidelines?

A. Absolutely. Teleline had submitted whatever we were required to submit. AT&T had reviewed it, approved it, and asked for legal opinions on stuff, listened to the program, played the game. It viewed commercials and

there were no problems. It was just that they were undergoing this audit and a lot of people had responsibility to their job, and they just wanted to do whatever they were supposed to do.

* * *

[344] Q Fine. Could you describe the extent to which Teleline retapes Infoworx data and O.C.D.D. data pertaining to "Let's Make a Deal," please.

A Very simply, in response to this litigation and the discovery that was served on Teleline, Teleline has retained every bit of O.C.D.D. data and every bit of Infoworx data that was in its possession just prior to filing the lawsuit which I believe is every record since the inception of the game.

Now, nobody has looked at it. There are no more programers [sic] there, but I believe it's preserved in a form that could be run, reviewed, and utilized just as if the system were still on line.

Q What is this data contained on?

A Eight millimeter mag. tapes, mag. tapes, AT&T tapes, floppy discs, hard drives. There's redundant copies. I'm not a computer expert. I couldn't plug one of the cartridges in, but the equipment is there, and the system is there, and the conversant platform is there. All the pieces are there to read the data, and assuming the [345] data wasn't damaged or corrupted when something was moved, which I have no way of knowing as I sit here today, it should be there.

Q So you're saying the data is there.

The software is there, and the hardward is there?

A The data is there, the software is there, and the hardware is there.

* * *

Q Do you have any understanding as to how much of that data is retained by AT&T?

A I have no direct personal information, but based on experience with AT&T specifically involving their miraculous ability to look at the chargeback and uncollectible issue in 1992, I believe AT&T has a lot of information.

I don't know that for sure. Nobody has told me. I haven't had in-depth conversations, but it's amazing how when you challenge them on something, regardless of what time period, they're always able to come back with information to tell you why you're right and they're wrong.

* * *

[346] Q From your experience in dealing with this data at the time it was generated by AT&T and Infoworx, did AT&T and Infoworx have a copy of the data at that time?

A At the time it was generated?

Q Right.

A Well, AT&T clearly had an original because they sent us a copy.

Q Well, we haven't yet established that they sent you a copy.

A Okay.

Q Is it the case, according to your understanding, that AT&T kept the original and sent you a copy?

A I'm sure of it.

Q Does the O.C.D.D. data indicate whether the charge for a specific call was in fact collected on the one hand or removed or charged back on the other hand?

MR. WALTER: Collected from whom?

[347] MR. SPENCER: From the caller, from the end user.

THE WITNESS: A monthly O.C.D.D. tape includes chargeback and uncollectible information.

BY MR. SPENCER:

Q Is that chargeback and uncollectible information associated with specific calls?

A Yes.

Q So in your experience, is it possible to determine from the O.C.D.D. data whether the charge for a particular call – I'm talking about the charge to the caller, the end user – was collected or not?

A Yes. That's how Teleline verified whether somebody paid their phone bill.

* * *

in the AT&T total column, net revenues, revenues to U.S.A. Network, prizes awarded, royalties paid, net profits received by Teleline? Do you have any overall sense of those figures on a general basis?

A Are you asking me if I know what the numbers are if you added them all up as I sit here today?

Q Not if you know what the exact numbers are, but do you have an idea of what they would be, the ranges, an estimate?

A If you're asking me for dollar figures, no, not as I sit here today. The information could be created but not off the top of my head.

Q I assume it could be created by putting together all of these reports for the various time periods and just adding them up; is that right?

A That would be one way. It would be more accurate to just add up all the bills from AT&T which would ultimately carry the same information.

Q What bills from AT&T do you mean?

A The MultiQuest bills or the 900 billings that Teleline received on a monthly basis.

Q That would give us total information for the AT&T total figures; correct?

A That's correct.

* * *

[353] BY MR. SPENCER:

Q Mr. Lorsch, I'd like you to call into your mind all of the "Let's Make a Deal" programs until the life of the program. Now, you've testified before that there were [354] some changes from time to time, for example, in the price of the program and things like that – correct? – and the number that was called?

A Yes.

Q My question for you is:

Would you say that the content of all of the versions of the "Let's Make a Deal" program was fundamentally the same from version to version?

MR. WITHROW: Objection. Leading and ambiguous. I don't know what you're talking about whether you're talking about the prize or game structure or advertising.

MR. SPENCER: I'm talking about the content of the game as perceived by the caller, and I'm not trying to lead you to say they were all the same or all different. I want to know from your point of view whether they were fundamentally the same or whether there were important differences among the various versions of the game.

MR. AUFDENSPRING: Objection. I think that's also ambiguous and calls for speculation.

MR. WITHROW: Are you talking about the recorded message? Are you talking about advertising?

MR. SPENCER: I'm talking about the game as played by the caller which I believe is the recorded message. I'm not talking about advertising right now.

THE WITNESS: I believe I testified yesterday that the [355] game was fundamentally the same. Changes to the game were infrequent. The concept of the game was created at the beginning of the game, and it was essentially the same concept at the end of the game other than for the changing of price and changing of prizes and maybe adding one more level when the prize structure got to $1,000 or $2,000 in cash.

Other changes which wouldn't have affected the content, or "play value" as we called it, of the game were the changes that we had to make pursuant to guidelines from AT&T such as preambles, kill messages.

At one point AT&T called and played the game and didn't believe that the preamble and one of the phrases was clear. So they had us change that, but nothing – there were no changes that materially changed what the game was.

BY MR. WITHROW:

Q So the fundamental contents of the game remained the same throughout its life?

A Other than, as I said, for the possibility that as the prize structure went up and the amount of dollars that one could win increased, I believe that Teleline added another level to the game, but you always called in, heard information up front, were asked for your telephone number, had to answer a question, had to pick a door, decide whether you wanted to keep your prize or go to the next level.

Essentially the concept of how you played the [356] game remained the same from inception.

Q Now I want to ask you the same kind of question but with respect to the promotional materials that Teleline used for "Let's Make a Deal."

From your perspective in running "Let's Make a Deal," did the promotional materials – I'm speaking broadly now – convey the same message throughout the life of the program and over the different types of advertising materials that were used?

MR. AUFDENSPRING: Objection. Leading. No foundation and speculative.

MR. WITHROW: I'd like to add that it's a leading question and vague and ambiguous. I really don't know what you mean by "message." A lot of messages are conveyed through the advertising such as prize, such as duration of the call. So I think it is a very unclear question.

MR. SPENCER: I'll stand by my question, Mr. Lorsch. Again I'm not suggesting that you should give one answer or the other. Answer as you see fit.

MR. WALTER: It might help, however, to define it in terms of the medium. For example, we've talked about printed media. We've talked about radio to a certain extent and television and cable and 30-minute ads and two-minute ads and 30-second ads.

So perhaps to avoid the ambiguity problem and [357] make the question answerable, some specificity might be helpful.

MR. SPENCER: Let me ask Mr. Lorsch whether he views it that way.

Q Do you think that there were differences in the fundamental advertising message as to the various categories of media that Mr. Walter has just mentioned?

MR. AUFDENSPRING: Same objections for the record.

MR. WITHROW: Same objection.

THE WITNESS: There was no difference. At the beginning of the game, the company developed a formula

that worked, and we carried that formula through throughout the duration of the game in our advertising.

In view of all the objections, the reason I'm so sure about this is because the commercials were made from source material that was shot with Monty Hall. Of the entire life of the program, from the first day we shot commercials to the last shoot of the infomercial, I think Monty Hall showed up on a set three, maybe four times.

Since Monty Hall was the principal personality, the principal character and the speaker of the principal message of the commercial, all commercials were taking Monty Hall and putting him into different environments.

The message was "Hi. I'm Monty Hall. Now you [358] can play 'Let's Make a Deal' on a touch-tone phone. It's fun. It's exciting. Here's a 900 number," and either win a toaster or win cash or win whatever it was at the time.

* * *

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
STATESBORO DIVISION

JAMES W. SIKES, INDIVIDUALLY, AND ON BEHALF OF ALL OTHER PERSONS SIMILARLY SITUATED,	) Case No. CV 692-147) Volume I) Pages 1-204
Plaintiffs,	)
vs.	)
AMERICAN TELEPHONE AND TELEGRAPH COMPANY,	)
Defendant.	)

DEPOSITION OF ROBERT HAROLD LORSCH
TAKEN ON
FRIDAY, AUGUST 30, 1996

[32] Q. Now, Mr. Lorsch, can you tell us whether, in your view, the fundamental concept and structure of the game changed or didn't change over the three years that it was active?

A. The fundamental concept and structure of the game was pretty much exactly like the fundamental concept and structure of the game as it was played on television. So no, it was not changed. I mean the fundamental concept was really the concept of the "Let's Make A Deal" licensure and the concept of the game that, you know, millions of us grew up with watching Monty Hall play it for so many tons of years.

Q. Why did you submit any of the types of changes to the type of prizes or the amounts of money and the like to AT&T for their approval?

A. Because it was required by AT&T.

* * *

[37] question; and two, something of value to the consumer. And so as I recall, what we did is we designed that question in the form of an audience qualifying question in order to comply with AT&T's requests in producing the program.

Q. Did you submit those questions to AT&T for approval?

A. As I stated earlier, I believe we submitted everything to AT&T for approval; so I would answer I believe yes, to the best of my knowledge.

Q. So you said that question was inserted in the script. Were you referring to the skill-related question when you spoke about that?

A. Yes.

Q. And how about the other thing that you mentioned, which was something of value to be imparted? Did that get included in the script?

A. Yes, it did.

Q. Was that at the request of AT&T?

MR. WITHROW: Objection. Leading.

THE WITNESS: Yes.

* * *

[49] Q. Did you and your company submit the advertising for "Let's Make A Deal" to AT&T for approval?

A. Absolutely.

* * *

[53] Did you have any understanding, Mr. Lorsch, as to what the consequences were of AT&T's complaint that you had allegedly failed to submit the commercial?

A. Yes. AT&T had rights to suspend the operation of a program that did not comply with the guidelines at their discretion.

Q. What was your understanding about what happened in this particular instance?

A. I was told on a number of occasions – one conversation in particular – that I had shaken AT&T's trust in my company because we were running this commercial featuring Santa Claus, which they had not ever reviewed or approved, when in fact they had the script, they had seen it, they had featured it at a conference at one point. And they shut down my business because of it.

* * *

[82] Q. Computer tapes?

A. Computer tapes, yes, sir.

Q. Were those preserved over time?

A. Yes, to the best of our ability despite floods and earthquakes.

Q. We had not previously asked you or your companies for those records, I don't believe, but we did ask you to bring them here today. Have you done that?

A. Yes, I have.

Q. Over against the wall to your left are many, many boxes of computer tape. Would you mind just going over and picking up one of the boxes, please, Mr. Lorsch –

A. Sure.

Q. – if you're not too connected with the microphone?

MR. BELL: Let me hand it to you.

THE WITNESS: Okay.

MR. SPENCER: Just one of them, John.

THE WITNESS: This is one of the boxes containing a mag tape that was apparently for [83] the "Let's Make A Deal" game and possibly other programs from March of 1992. And these were sent to us by AT&T. They are all in their original AT&T account Airborne package, and most of them are marked as to what exactly is on them. And there's approximately 240 of these that I believe I brought with me this morning.

* * *

Q. Has the data on those tapes been changed at all or does it remain the way it was when you got them?

A. It remains exactly the way it was when we got them from AT&T.

* * *

[103] Q. Mr. Lorsch, I have only a couple of more quick questions. I'm going to read a statement and ask you whether you agree with it or not. Individuals who played

the "Let's Make A Deal" 900 number program by calling did so for reasons entirely unrelated to their chance of winning.

Do you agree with that?

MR. WITHROW: Object to form.

[104] THE WITNESS: I can't think of anybody who would spend three or more dollars a minute to call "Let's Make A Deal" for any reason but to have a chance to win the prize and play the game. So I would definitely not agree with that.

BY MR. SPENCER:

Q. I've put two boxes of materials that we received from –

A. I thought you were going to have me play the game, pick a box or something.

Q. No. I put two boxes of materials on the floor next to you to your left, and those are materials that we have received from Teleline also. Can you describe what those are, please?

A. Those are copies of hard copy invoices showing billings, collections and remittances for Teleline 900 number programs from early on in Teleline's relationship with AT&T, through I believe the end of 1992, although I'm not totally sure that it's that complete.

Q. Were all of those materials received and filed in the ordinary course of [105] business by Teleline?

A. Yes. They were.

Q. Have any of them been tampered with?

A. Not to my knowledge or belief, no.

* * *

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No. 02-124

IN THE

Supreme Court of the United States

JAMES W. SIKES and FELIX KEMP,

Petitioners,

v.

AT&T CORP.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT FOR THE ELEVENTH CIRCUIT

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STATEMENT PURSUANT TO RULE 29.6

Respondent, AT&T Corp. (formerly known as American Telephone & Telegraph Company), has no parent corporation and no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

	Page
Statement Pursuant to Rule 29.6	i
Table of Contents	ii
Table of Cited Authorities	iii
Introduction	1
Counterstatment of the Case	4
Reasons for Denying the Writ	12
I. There Is No Conflict Among The Circuits Regarding The Appropriate Standard Of Review For District Court Certification Orders.	12
II. The Eleventh Circuit's Refusal To Allow Elements Of A Claim To Be Presumed In Order To Facilitate Class Certification Recognized A Well-Settled Rule Of Law And Presents No Issue For Review By This Court.	17
III. There Is No Conflict Among The Circuits Regarding The Standard For Certifying A Nationwide Class That Will Require The Application Of The Laws Of All Fifty States.	22
Conclusion	26

TABLE OF CITED AUTHORITIES

Page

Cases:

Alabama v. Blue Bird Body Co., Inc., 573 F.3d 309 (5th Cir. 1978) 20

Amaco Enters., Inc. v. Smolen, 1995 U.S. App. LEXIS 20486 (9th Cir. 1995) 19

Amchem Prods. Inc. v. Windsor, 521 U.S. 591 (1997) 13, 19

Andrews v. AT&T, 95 F.3d 1014, *reh'g denied en banc*, 104 F.3d 373 (11th Cir. 1996) ..... *passim*

Appletree Square I Ltd. Pshp. v. W.R. Grace & Co., 29 F.3d 1283 (8th Cir. 1994) 18

AT&T v. Central Office Tel. Inc., 524 U.S. 214 (1998) 4

Barney v. Holzer Clinic, 110 F.3d 1207 (6th Cir. 1997) 14

Basic Inc. v. Levinson, 485 U.S. 224 (1988) 22

Berger v. Compaq Computer Corp., 257 F.3d 475 (5th Cir. 2001) 15

Bill Heard Chevrolet Co. v. Dixon, 2001 Ala. LEXIS 383 (Ala. 2001) 24

Boughton v. Cotter Corp., 65 F.3d 823 (10th Cir. 1995) 14

Cited Authorities

Page

Brandenburg v. Seidel, 859 F.2d 1179 (4th Cir. 1988) 18

Broussard v. Meineke Discount Muffler Shops, Inc., 155 F.3d 331 (4th Cir. 1998) 15, 22

Carroll v. Cellco Pshp., 713 A.2d 509 (N.J. Super. 1998) 20

Castano v. American Tobacco Co., 84 F.3d 734 (5th Cir. 1996) ..... *passim*

Chin v. Chrysler Corp., 182 F.R.D. 448 (D.N.J. 1998) 19, 23, 24

Cichonski v. American Inventors Corp., 1995 U.S. Dist. LEXIS 16563 (E.D. Pa. 1995) 22

Coleman v. GMAC, 2002 U.S. App. LEXIS 14644 (6th Cir. 2002) 12

County of Suffolk v. Long Island Lighting Co., 907 F.2d 1295 (2d Cir. 1990) 18

Delta Air Lines, Inc. v. Air Line Pilots Ass'n Int'l, 238 F.3d 1300 (11th Cir. 2001) 13

Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974) .. 10

Ex parte Green Tree Fin. Corp., 723 So.2d 6 (Ala. 1998) 23

Freedman v. Arista Records, Inc., 137 F.R.D. 225 (E.D. Pa. 1991) 22

Cited Authorities

Page

General Tel. Co. of Southwest v. Falcon, 457 U.S. 147 (1982) 3, 13

Georgine v. Amchem Prods., 83 F.3d 610 (3d Cir. 1996), *aff'd*, 521 U.S. 591 (1997) 23

Glick v. MTV Networks, 796 F. Supp. 743 (S.D.N.Y. 1992) 24

Grantham & Mann v. American Safety Prods., 831 F.2d 596 (6th Cir. 1987) 18

Gulf Oil Co. v. Bernard, 452 U.S. 89 (1981) 12

Harper v. AT&T, 54 F. Supp.2d 1371 (S.D. Ga. 1999) 21

Hawkins v. Comparet-Cassani, 251 F.3d 1230 (9th Cir. 2001) 14

Holmes v. Securities Investor Protection Corp., 503 U.S. 258 (1992) 17

Horton v. Merrill Lynch, Pierce, Fenner & Smith, 855 F. Supp. 825 (E.D.N.C. 1994) 15

Hudson v. Delta Airlines, 90 F.3d 451, 457 (11th Cir. 1996), *cert. denied*, 117 S. Ct. 1082 (1997) 19, 20

Ideal Dairy Farms v. John Labatt, Ltd., 90 F.3d 737 (3d Cir. 1996) 18

In re Ford Motor Co. Vehicle Paint Litig., 182 F.R.D. 214 (E.D. La. 1998) 19, 22

Cited Authorities

Page

In re: LifeUSA Holding, 242 F.3d 136 (3d Cir. 2001) 13, 14

In re Stucco Litig., 175 F.R.D. 210 (E.D.N.C. 1997) 25

In the Matter of Detariffing of Billing and Collection Services, 102 F.C.C.2d 1150 (1986), *recon. denied*, 1 F.C.C.R. 445 (1986) 5

James v. City of Dallas, 254 F.3d 551 (5th Cir. 2001), *cert. denied*, 122 S. Ct. 919 (2002) 14

Johnson v. Penrod Drilling Co., 469 F.2d 897 (5th Cir. 1972) 25

Lienhart v. Dryvit Sys., Inc., 255 F.3d 138 (4th Cir. 2001) 12, 14

Mack v. GMAC, 169 F.R.D. 671 (M.D. Ala. 1996) ... 22

Martin v. Dahlberg, Inc., 156 F.R.D. 207 (N.D. Cal. 1994) 19, 22

Martinez v. Weyerhaeuser Mortg. Co., 1997 U.S. Dist. LEXIS 22172 (S.D. Fla. 1997) 24

MGIC Indem. Corp. v. Weisman, 803 F.2d 500 (9th Cir. 1986) 18

Mulligan v. Choice Mortg. Corp. USA, 1998 U.S. Dist. LEXIS 13248 (D.N.H. 1998) 22

Cited Authorities

Page

Murphy v. Sofamor Danek Group, 123 F.3d 394 (6th Cir. 1997), *cert. denied*, 523 U.S. 1106 (1998) 18, 20

Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340 (1978) 10

Pelletier v. Zweifel, 921 F.2d 1465 (11th Cir.), *cert. denied*, 502 U.S. 855 (1991) 18

Perrone v. GMAC, 232 F.3d 433 (5th Cir. 2000), *cert. denied*, 532 U.S. 971 (2001) 18, 20

Reynolds v. East Dyer Dev. Co., 882 F.2d 1249 (7th Cir. 1989) 18

Robinson v. Metro-North Commuter R.R., 267 F.3d 147 (2d Cir. 2001), *cert. denied*, 122 S. Ct. 1349 (2002) 14

Rosentstein v. CPC Int'l, Inc., 1991 U.S. Dist. LEXIS 200 (E.D. Pa. 1991) 19, 22

Securities Investor Protection Corp. v. BDO Seidman, LLP, 222 F.3d 63 (2d Cir. 2000) 18

Sikes v. Teleline, 281 F.3d 1350, *reh'g denied en banc*, 2002 U.S. App. LEXIS 10585 (11th Cir. 2002) ..... *passim*

Simon v. G.D. Searle & Co., 816 F.2d 397 (8th Cir. 1987) 16

Cited Authorities

Page

Southwestern Refining Co. v. Bernal, 22 S.W.3d 425 (Tex. 2000) 24

Spence v. Glock, GES. m.b.H, 227 F.3d 308 (5th Cir. 2000) 12, 24

State v. Schubert Theatre Players Co., 281 N.W. 369 (Minn. 1938) 24

Stirman v. Exxon Corp., 280 F.3d 554 (5th Cir. 2002) 24

Strain v. Nutri/System, Inc., 1990 U.S. Dist. LEXIS 17031 (E.D. Pa. 1990) 19, 21, 22

Summit Props., Inc. v. Hoechst Celanese Corp., 214 F.3d 556, *reh'g denied en banc*, 228 F.3d 411 (5th Cir. 2000), *cert. denied*, 531 U.S. 1132 (2001) 3, 18, 20

Turner v. Beneficial Corp., 242 F.3d 1023 (11th Cir.), *cert. denied*, 122 S. Ct. 51 (2001) 13

Walsh v. Ford Motor Co., 807 F.2d 1000 (D.C. Cir. 1986), *cert. denied*, 482 U.S. 915 (1987) ... 15, 23, 25

Washburn v. Kansas City Life Ins. Co., 831 F.2d 1404 (8th Cir. 1987) 21

Washington Mutual Bank v. Superior Court, 15 P.3d 1071 (Cal. 2001) 24

Waste Mgmt. Holdings, Inc. v. Mowbray, 208 F.3d 288 (1st Cir. 2000) 13

Cited Authorities

Page

Wilkes v. Ford Motor Co. (In re Ford Motor Co. Ignition Switch Prods. Liab. Litig.), 174 F.R.D. 332 (D.N.J. 1997) 24, 25

Zinser v. Accufix Research Inst., Inc., 253 F.3d 1180 (9th Cir. 2001) 24

Statutes:

15 U.S.C. § 5701 6

18 U.S.C. § 1961, *et seq.* 2

18 U.S.C. § 1964 17

28 U.S.C. § 1292 16

28 U.S.C. § 2072 19

47 U.S.C. § 201, *et seq.* 2

47 U.S.C. § 228 6

O.C.G.A. § 16-14-1, *et seq.* 2

Cited Authorities

Page

Rules:

Fed. R. App. P. 5(b)(2) 25

Fed. R. Civ. P. 23 ..... *passim*

Fed. R. Civ. P. 39(a) 25

Other Authority:

47 C.F.R. § 64.1501, *et seq.* 6

RESPONDENT'S BRIEF IN OPPOSITION

The Petition for a Writ of Certiorari should be denied because the decision below represents a routine application of settled law and does not present any issue of general importance. The Eleventh Circuit decertified the class in this case because the district court's certification ruling disregarded binding Eleventh Circuit law rendered in a related case that the district court could not eliminate elements of each plaintiff's claim by entertaining class-wide presumptions of reliance and injury in order to justify class treatment. The district court also ignored any impediment to class certification presented by its own determination that the case required the application of all fifty states' gambling laws. Instead, the district court improperly entertained the legal fiction that all states' gambling laws were similar. The Petition should be denied because the Eleventh Circuit's decision neither conflicts with the decisions of any other Circuit nor raises any issue that implicate the supervisory power of this Court as Petitioners erroneously assert.

INTRODUCTION

This is the third of three related putative class actions that have met the identical fate — decertification by the Eleventh Circuit Court of Appeals. Each case asserted a nationwide class to challenge the legality of certain 900-number telephone programs. *Andrews v. AT&T* challenged all 900-number programs that offered a chance to win a prize, while *Harper v. AT&T* attacked all 900-number programs involving credit cards or credit services.[1] In this case, Petitioners James W. Sikes and Felix Kemp ("Petitioners") challenged a particular 900-number program encompassed within the *Andrews* class definition, the "Let's Make A Deal" ("LMAD") program.

---

1. The *Andrews* and *Harper* actions were effectively consolidated for class certification purposes and are hereafter collectively referred to as "*Andrews*."

Each of these actions claimed that AT&T Corp.'s ("AT&T") provision of billing and collection services for the described 900-number programs constituted, among other things, mail and wire fraud and/or illegal gambling.[2] In each case, the district court certified nationwide classes and, because otherwise the litigation would have been unmanageable, adopted various "presumptions" to eliminate the need for the individual proofs required to establish each class member's claim. Thus, the district court adopted a presumption that each and every class member had justifiably relied on a misrepresentation in deciding to call the 900-number programs. Similarly, despite the fact that there were extensive refunds and credits made to those billed for calls to the 900-number programs at issue, to permit class certification, the district court was willing to presume that each and every class member had suffered a compensable injury. Further, although the district court recognized the necessity of applying the gambling laws of all fifty states, it assumed that these various states' laws would be sufficiently similar to allow the cases to be effectively managed. (R13-291-Ex.2-28-30; R5-142-8, 10-11).

The Eleventh Circuit reversed the district court's certifications, first in *Andrews v. AT&T*, 95 F.3d 1014, *reh'g denied en banc*, 104 F.3d 373 (11th Cir. 1996), which the representative plaintiffs did not pursue before this Court. Then, five years later, the Eleventh Circuit followed the *Andrews* ruling and reversed the district court's certification in this case. *Sikes v. Teleline*, 281 F.3d 1350, *reh'g denied en banc*, 2002 U.S. App. LEXIS 10585 (11th Cir. 2002).

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2. The complaints in each case asserted claims under the Federal Racketeering Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961, *et seq.*; the Federal Communications Act ("FCA"), 47 U.S.C. § 201, *et seq.*; and the Georgia RICO Act, O.C.G.A. § 16-14-1, *et seq.* Also named as defendants in this action were Teleline, Inc. ("Teleline"), the sponsor of the LMAD program, and U.S.A. Networks ("U.S.A."), which broadcast certain LMAD advertising. (R1-1-¶ 6-9; R5-142-1, 4, 7).

Despite the articulation of the questions presented, the Petition is simply a challenge to the ordinary application of the proper standard of review for class certification decisions. Indeed, Petitioners concede that the Eleventh Circuit properly articulated that standard but complain that in practice it applies an "essentially plenary *de novo* review" to class certification orders. (Petition at 10). However, the review standard and its application were patently correct because, as even the district court itself recognized, the fundamental issues underlying its certification orders were questions of law — whether it could adopt the substantive law presumptions it found were needed to justify class treatment and to facilitate certification under Rule 23. (R13-287-3). The Eleventh Circuit's recognition that "'[a] district court abuses its discretion if . . . it applies the wrong legal standard . . . ,'" is consistent with the review standards applied by all of the Circuit Courts of Appeals. *Sikes*, 281 F.3d at 1359 (citation omitted); *see* p. 12, *infra*. Further, Petitioners' suggestion that there should be a presumption in favor of certification (Petition at 11, 15-16) is contrary to this Court's instruction that "actual, not presumed" compliance with the requirements of Rule 23 is "indispensable." *General Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 160 (1982).

Second, Petitioners are flatly wrong when they contend that the Eleventh Circuit's refusal to allow reliance to be presumed on a class-wide basis conflicts with established law. (Petition at 16). The overwhelming weight of authority has unequivocally rejected the notion that it is appropriate to presume reliance outside the context of securities fraud. *See, e.g., Summit Props., Inc. v. Hoechst Celanese Corp.*, 214 F.3d 556, 561, *reh'g denied en banc*, 228 F.3d 411 (5th Cir. 2000), *cert. denied*, 531 U.S. 1132 (2001) ("No court has accepted the use of [the fraud on the market] theory outside of the context of securities fraud . . ." and rejecting the use of a presumption of reliance in a RICO claim predicated on fraud); *see* p. 17, *infra*. Petitioners' contention that the consequence of the Eleventh Circuit's decision is to deny the use of

circumstantial evidence to establish fraud claims is directly refuted by the decision itself, which states that its ruling does not mean that only direct evidence, and not circumstantial evidence, may be used to establish reliance. *Sikes*, 281 F.3d at 1363 n.32.

Petitioners' final question articulates an issue that is simply not presented by the Eleventh Circuit's decision, and is based on the erroneous assumption that the Eleventh Circuit adopted a *per se* rule that any case requiring the district court to apply the laws of all fifty states precludes class certification. (Petition at 24). However, the Eleventh Circuit did not adopt any such *per se* rule. Nor did Petitioners contend before the Eleventh Circuit that if all fifty states' gambling laws applied, the case nevertheless would be manageable. Instead, Petitioners argued that the district court had erred by finding that all fifty states' gambling laws applied, when it should have applied, at most, the gambling laws of four states. As the Eleventh Circuit recognized, however, because Petitioners failed to file a cross-appeal on this choice of law issue, it had not been preserved for review. *Sikes*, 281 F.3d at 1367 n.44.

Because the Eleventh Circuit properly applied well-established legal principles in reversing the district court's class certification order, the Petition presents no issue warranting this Court's review or consideration.

COUNTERSTATMENT OF THE CASE[3]

AT&T provided early 900-number services as a common carrier.[4] (R19-143-48-49). Pay-per-call, or "900-number,"

3. Because the Statement of Facts set forth in the Petition seriously misrepresents portions of the record, AT&T provides this Counterstatement, setting forth the facts pertinent to the district court's class certification decision.

4. The tariffs filed with the FCC that govern AT&T's provision of such services carry the force of law. *See, e.g., AT&T v. Central Office Tel. Inc.*, 524 U.S. 214 (1998).

telephone services were introduced in the early 1980s to measure caller reaction to particular events or issues (such as presidential debates) and to "broadcast" recorded, non-interactive messages to callers. These services rapidly expanded to include a wide range of "interactive" programs offering information on sports, weather, medicine, news, entertainment, and finance. (R19-143-39-40). Eventually, some message providers or sponsors unfortunately offered programs that were of questionable value or offensive to some people (*e.g.*, "Dial-A-Porn" programs) (R19-143-94); however, as a common carrier, AT&T was prohibited from denying transport service on the basis of message content.

Concerned that dissatisfaction with objectionable 900-number programs would undermine consumer confidence in regular long distance service, and in reliance on FCC decisions holding that billing and collection services need not be offered pursuant to tariff,[5] AT&T amended its 900-number tariff to separate the common carrier transport function from the billing and collection function. (R19-143-38-39, 93-94). Under these new arrangements, AT&T charged the program sponsor for the calls on a tariffed basis, and the sponsor in turn charged the callers for the information service. That sponsor-set, untariffed charge was then included by AT&T on the callers' telephone bills. (R19-143-43, 45). AT&T provided this billing service to the sponsor under a separate contract, generally for a minimal fee of between five and ten percent of the sponsor's charge. (R19-143-41-44, 49). AT&T only provided untarriffed billing and collection services to sponsors who agreed to comply with AT&T's 900-number program guidelines.[6] (R19-143-51-52, 95; R5-140-tab 27).

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5. *See, e.g., In the Matter of Detariffing of Billing and Collection Services*, 102 F.C.C.2d 1150 (1986), *recon. denied*, 1 F.C.C.R. 445 (1986).

6. The 900-number guidelines AT&T created have served as a model for later efforts by federal and state lawmakers to control 900-
(Cont'd)

The Let's Make A Deal ("LMAD") program operated from early 1990 until December 1992. AT&T terminated billing and collection services for LMAD in December 1992 when it discovered that Teleline had failed to submit the majority of its LMAD advertising and message scripts for review as required by AT&T's guidelines. (R19-143-53, 61). Teleline then sued AT&T for terminating its billing and collection services. (R19-143-61, 112, 116-17).

LMAD was generally modeled on the television show of the same name and involved players answering questions and choosing "doors" in an effort to win a prize. After a win, players could stop playing or could continue the game and try for the top prize. A new game began every calendar month, and updated rules regarding the program were issued when necessary. (R19-143-148-49).[7] Teleline created the advertising and audio message heard by callers to the programs, identified possible markets and placed the advertising, developed the computer programming necessary for running the programs, and managed and operated the programs. (R19-143-137-46, 155).

Teleline submitted for AT&T review its initial advertising, the text of the initial message script to be used, and written legal opinions that that the LMAD game complied with all applicable federal and state laws. (R19-143-56, 148; R5-140-tab 27). However, the LMAD advertising was changed over

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(Cont'd)

number program content and advertising. *See, e.g.*, 47 C.F.R. § 64.1501, *et seq.* (regulations governing 900-number programs promulgated by the FTC and FCC pursuant to the Telephone Disclosure and Dispute Resolution Act of 1992, 47 U.S.C. § 228; 15 U.S.C. § 5701).

7. Petitioners notably fail to inform the Court that individuals were not required to call a 900-number in order to play the LMAD game and that Teleline provided a toll-free number for individuals to call with questions about the game. Indeed, in the last six months of operation, some 20,200 individuals used the free mail-in alternative to play, and some 102,900 persons called the LMAD 800-number. (R19-143-152).

time, and the LMAD game was advertised through multiple media outlets[8] using multiple messages. Further, the game's structure varied significantly over time. (R19-143-138-39, 143, 151; R5-140-tabs 3, 7).

AT&T provided three services in connection with LMAD. (*See* R19-143-91, 137-40, 143-45, 164-65). AT&T carried calls to LMAD's 900-numbers for a tariffed charge and supplied Teleline with call termination services, which in effect constituted the "answering machine" for LMAD. (R19-143-55, 57-58, 91).[9] The recorded messages, however, were devised by Teleline. (R19-143-155-56). AT&T also provided billing and collection services pursuant to contract for a fee of six percent of Teleline's charges to callers. (R19-143-49). As part of this service, AT&T provided "billing inquiry" that enabled individual callers with billing questions or complaints about the program or its charges to contact an AT&T service representative at an 800-number and, if dissatisfied, to obtain a refund or credit. (R19-143-98).

AT&T was not, however, as Petitioners assert, the only entity to handle consumer complaints or requests for refunds. (Petition at 5). Consumers could, and did, procure refunds and adjustments for 900-number calls to LMAD from local exchange carriers and Teleline. (R19-143-101-02, 150-51). Because local exchange carriers tracked 900-number refunds only on a collective basis, and not by the individual caller receiving a credit or refund of charges, the district court acknowledged that

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8. Although Petitioners imply that the LMAD game was advertised exclusively through television commercials on U.S.A. network, the evidence is undisputed that, in addition to 30 second commercials, two minute commercials, and 30 minute infomercials on U.S.A., the LMAD game was also advertised through print media (such as the National Enquirer and newspapers), and direct mail solicitations. (R19-143-131, 138-46, 151, 160-61, 165-68; R5-140-tab 30).

9. Teleline also obtained call termination service from other vendors. (R5-149-143).

there is no way to determine which class members actually paid for calls to LMAD or received refunds from the local exchange carriers. (*See* R19-143-67-68, 98-100, 103, 106-07).[10]

Although Mr. Sikes and Mr. Kemp seek to represent a class of all individuals who have been billed for calls made to LMAD (R3-89-14), neither actually called LMAD or played the LMAD game. (R19-143-9, 22). Instead, their charges were generated by children — Mr. Sikes' son and Mr. Kemp's grandson. (R19-143-9-10, 19). Prior to receiving their telephone bills, Mr. Sikes and Mr. Kemp had never seen any advertisements for LMAD. (R19-143-14, 22). Neither can identify what advertisement, if any, the children saw, whether the children called LMAD in response to an advertisement or even what might have been false, deceptive or misleading in any such advertisement. (R19-143-15, 23). Additionally, Mr. Sikes has never paid for any calls his son made to LMAD. (R19-143-14, 22-23).

The district court certified a nationwide class in this case consisting of all persons who had been billed for calls made in connection with LMAD and who had not received cash prizes exceeding the charges incurred for such calls. (R5-142-12). In certifying the classes, the district court rejected AT&T's claim that individual issues of reliance, injury and damages, and the need to apply the gambling laws of all fifty states, precluded certification. Rather, the district court:

> (1) expressly recognized that detrimental reliance was an essential element of Petitioners' RICO claims predicated on mail and wire fraud, but concluded that the necessity of proving individual reliance did not preclude class treatment because such reliance could be "virtually presumed;"

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10. In this case, over $2 million in refunds and uncollectible debt for LMAD was booked by AT&T but never repaid by Teleline. (R19-143-105-06).

(2) dispensed with any requirement that class members prove that they had suffered a RICO injury by paying for a call to LMAD and, although it recognized that presuming injury and damage would permit individuals who had never paid for calls to LMAD to recover damages, concluded that such a "double recovery" was permissible because it would "not significantly harm" AT&T; and[11]

(3) held that applying the varying gambling laws of all fifty states would not predominate over common issues because the application of such varying states' laws "would share many common questions."

(R5-142-8, 10-11; R13-287-3). The district court denied AT&T's request for permission to pursue an interlocutory appeal of the certification decision.[12] (R5-142-14).

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11. In their most egregious misrepresentation of the record, Petitioners suggest that AT&T affirmatively conceded that "individual caller data was not needed 'to assess or calculate damages in this case,'" in order to avoid having to convert to computer format certain of its LMAD call detail records stored on microfiche. (Petition at 8). The record, however, is patently clear that AT&T consistently asserted that the LMAD call detail report could not be used to establish damages because it did "nothing other than identify an amount billed to a particular telephone number. It does not establish that any class member in fact paid for a call, how much a class member paid for a call, or whether the class member received a refund." (Petition App. 118). Because the call detail data, at most, could be used to establish the gross revenues for the LMAD program, a number to which AT&T was willing to stipulate, it argued that there was no need to incur the tremendous expense of converting this data to a computer format. (*Id.*).

12. Because the order also improperly required AT&T to pay one-half of the costs ($225,000.00) associated with providing the class with notice by publication, AT&T directly appealed the certification order (Cont'd)

Thereafter, the district court entered a virtually identical order certifying nationwide classes in *Andrews*. (R13-291-Ex.2-28-30). However, recognizing that its certification order was of "nationwide significance" and that there could be "a substantial ground for difference of opinion," the district court authorized the defendants in *Andrews* to seek interlocutory review of its decision. (R13-291-Ex. 2-34-35).

The Eleventh Circuit granted the interlocutory petition in *Andrews* and reversed the district court's certification of the plaintiff classes. *Andrews v. AT&T*, 95 F.3d 1014, *reh'g denied en banc*, 104 F.3d 373 (11th Cir. 1996). In particular, recognizing that class treatment could not be used to alter the substantive proof required to succeed on a claim for relief, the Eleventh Circuit rejected the district court's attempt to satisfy the predominance requirement of Rule 23(b)(3) and render the litigation manageable by presuming that each class member justifiably relied on a misrepresentation, and suffered a compensable injury as a result. *Id.* at 1025. Similarly, the Eleventh Circuit rejected the district court's unfounded assumption that the gambling laws of all fifty states were sufficiently similar to justify class treatment. *Id.* at 1024. The representative parties in *Andrews* did not seek this Court's review of the Eleventh Circuit's decision.

Following the Eleventh Circuit's decision in *Andrews*, AT&T moved to decertify the instant action. The district court denied AT&T's motion, concluding that *Andrews* did not preclude continued class treatment in this case or the use of presumptions to establish the essential elements of reliance, injury and damage. *Sikes v. AT&T*, 179 F.R.D. 342, 346-47

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under the collateral order doctrine. (R5-144-1). *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974); *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340 (1978). This appeal was subsequently dismissed as moot after the district court vacated that portion of its order imposing notice costs on AT&T. (R5-165-1; R6-172-1).

(S.D. Ga. 1998). Instead, it distinguished *Andrews* on the basis that it involved a number of different 900-number programs, while this case involved only one 900-number program. *Id.* Moreover, although the district court explicitly recognized that the majority in *Andrews* "expressed reservations concerning the manageability of undertaking inquiries into the laws of all fifty states absent a thorough analysis of the various state laws by the class proponents," it again concluded that such a pre-certification analysis of all fifty states' gambling laws was unnecessary in this case. *Id.* at 348.

The district court subsequently certified its decision for interlocutory appeal, and the Eleventh Circuit again reversed, rejecting the district court's attempts to distinguish *Andrews* and holding that because *Andrews* "rejected the propriety of allowing a presumption that would relieve plaintiffs of their burden of having to prove every element of a claim . . . we must do the same in this case." 281 F.3d at 1362. The Court also concluded that the district court's bases for employing the various presumptions were erroneous. *Id.* at 1362-64. Specifically, the Eleventh Circuit held that because class members, and not AT&T, controlled any evidence as to whether they relied on a misrepresentation or suffered an injury as a result of such reliance, there was no basis for presuming the elements of reliance, injury or damage, and further, because not all of the LMAD advertising was available and Petitioners' expert testified that the available advertisements varied "'in terms of their potential to deceive,'" no presumption that all LMAD advertising was misleading could be employed. *Id.* at 1362-65.

Petitioners seek review by this Court claiming that the Eleventh Circuit (1) fails to accord sufficient deference to district court certification decisions and, in particular, district court findings regarding the superiority and/or manageability of class actions (Petition at 10-11); (2) broke with common law principles when it refused to permit the essential element of

reliance to be presumed in a civil RICO action predicated on fraud (Petition at 16); and (3) improperly adopted a *per se* rule that the necessity of applying the laws of all fifty states necessarily precludes a finding of superiority under Rule 23. (Petition at 24). Points 1 and 2 reflect incorrect statements of accepted law, and point 3 misstates the Eleventh Circuit's ruling.

Because the Eleventh Circuit's decision in this action presents no novel issue, but applied settled law to unique facts; does not implicate any issue on which there is a conflict in the Circuits; and reflects no issue of national importance, Petitioners have presented no issue that warrants review by this Court.

REASONS FOR DENYING THE WRIT

I. There Is No Conflict Among The Circuits Regarding The Appropriate Standard Of Review For District Court Certification Orders.

As this Court has recognized:

> [b]ecause of the potential for abuse, a district court has both the duty and the broad authority to exercise control over a class action and to enter appropriate orders governing the conduct of counsel and parties. But this discretion is not unlimited, and indeed is bounded by the relevant provisions of the Federal Rules.

Gulf Oil Co. v. Bernard, 452 U.S. 89, 100 (1981). Thus, in reviewing district court certification orders, the Circuit Courts agree that while the decision to certify a class rests in the sound discretion of the district court, that discretion must be exercised within the confines of Rule 23. *Sikes*, 281 F.3d at 1359; *Castano v. American Tobacco Co.*, 84 F.3d 734, 740 (5th Cir. 1996); *Lienhart v. Dryvit Sys., Inc.*, 255 F.3d 138, 146 (4th Cir. 2001); *Coleman v. GMAC*, 2002 U.S. App. LEXIS 14644, *4-5 (6th Cir. 2002); *Spence v. Glock, GES. m.b.H*, 227 F.3d 308, 310 (5th Cir. 2000). Because "actual, not presumed"

compliance with the requirements of Rule 23 is "indispensable," *Falcon*, 457 U.S. at 160, there cannot be, as Petitioners claim, a presumption in favor of class certification. (Petition at 5). Rather, district courts are required to undertake a "rigorous analysis" of the factual and legal issues comprising a plaintiff's causes of action in order to ensure that the requirements of Rule 23 are actually met. *Falcon*, 457 U.S. at 160-61; *see also Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 623-24 (1997) (Rule 23's predominance inquiry focuses on "the legal or factual questions that qualify each class member's case as a genuine controversy"). Appellate review of a certification decision therefore appropriately focuses — as the Eleventh Circuit did here — on whether the class as certified meets all of the applicable Rule 23 requirements. *In re: LifeUSA Holding*, 242 F.3d 136, 144 (3d Cir. 2001).

The Eleventh Circuit properly recognized that it must defer to a district court's certification decision when it has "properly exercised its discretion within the parameters of Rule 23" in certifying a class. *Sikes*, 281 F.3d at 1359; *see also Andrews*, 95 F.3d at 1022. However, the Eleventh Circuit also has recognized its obligation to review *de novo* district court determinations regarding purely legal issues that underlie a discretionary certification decision. *Turner v. Beneficial Corp.*, 242 F.3d 1023, 1025 (11th Cir.), *cert. denied*, 122 S. Ct. 51 (2001) ("conclusions of law that informed" district court's certification decision reviewed *de novo*). And where a district court "applies the wrong legal standard" in certifying a class, the Eleventh Circuit recognizes that it has necessarily abused its discretion. *Delta Air Lines, Inc. v. Air Line Pilots Ass'n Int'l*, 238 F.3d 1300, 1308 (11th Cir. 2001).

The review standard, as articulated and applied by the Eleventh Circuit, is entirely consistent with the standard of review utilized by all other Circuit Courts of Appeals to address the issue. *See Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 295 (1st Cir. 2000) (district court abuses discretion in

certifying class if it "adopts an incorrect legal rule"); *Robinson v. Metro-North Commuter R.R.*, 267 F.3d 147, 162 (2d Cir. 2001), *cert. denied*, 122 S. Ct. 1349 (2002) ("'the failure to follow the proper legal standards in certifying a class . . . is an abuse of discretion'") (citation omitted); *In re: LifeUSA Holding*, 242 F.3d 136, 143-44 (3d Cir. 2001) (district court's certification decision premised on "an errant conclusion of law or an improper application of law to fact" is an abuse of discretion); *Lienhart v. Dryvit Sys., Inc.*, 255 F.3d 138, 146 (4th Cir. 2001) (district court's discretion to certify class "must be exercised within the framework of Rule 23"); *James v. City of Dallas*, 254 F.3d 551, 562 (5th Cir. 2001), *cert. denied*, 122 S. Ct. 919 (2002) (certification will be reversed if district court abuses its discretion or applied an incorrect legal standard in reaching its decision); *Barney v. Holzer Clinic*, 110 F.3d 1207, 1213 n.9 (6th Cir. 1997) ("A district court that either uses the wrong legal standard or misapplies the correct legal standard abuses its discretion"); *Hawkins v. Comparet-Cassani*, 251 F.3d 1230, 1237 (9th Cir. 2001) ("A court abuses its discretion if its certification order is premised on legal error"); *Boughton v. Cotter Corp.*, 65 F.3d 823, 826 (10th Cir. 1995) ("If the lower court did not apply an improper standard, the court's decision is reviewed for an abuse of discretion").

This case represents a routine application of this accepted standard to the facts of this case. The Eleventh Circuit recognized that the district court's certification turned on certain conclusions of law — that the court could (1) employ certain evidentiary presumptions in evaluating Rule 23's requirements of predominance and superiority; and (2) assume that the gambling laws of all fifty states could be manageably applied, even though neither Petitioners nor the district court had ever analyzed the differences among the states' laws. *Sikes*, 281 F.3d at 1359-60 ("While we do not dispute that manageability is generally an issue of fact and practicality and not one of law, we cannot overlook the fact that the district court reached its conclusions on manageability based upon a faulty legal

premise"). The Eleventh Circuit appropriately reviewed these legal issues *de novo*. *See Horton v. Merrill Lynch, Pierce, Fenner & Smith*, 855 F. Supp. 825, 833 (E.D.N.C. 1994) (whether presumption of reliance would have applied had securities fraud claim been litigated was a contested question of law); *Berger v. Compaq Computer Corp.*, 257 F.3d 475, 481 (5th Cir. 2001) (district court "unquestionably adopted an incorrect legal standard" when it presumed compliance with adequacy requirement in the absence of proof to the contrary); *Castano*, 84 F.3d at 741 (district court cannot accept "on faith" plaintiff's assertion that state laws do not vary); *Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1017 (D.C. Cir. 1986), *cert. denied*, 482 U.S. 915 (1987) (proponent of class certification is required to provide an "extensive analysis" of state law variations regarding all pertinent state law issues, and establish that the application of each state's law would not pose "insuperable obstacles" to class certification); *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 343 (4th Cir. 1998) (reversing certification following trial on the merits in part because district court impermissibly determined damages on a classwide basis in order to facilitate class treatment, when applicable state law required individualized proof of damages).[13]

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13. Although Petitioners contend that stating "reliance can be virtually presumed" was a mere "factual observation" and not a ruling of law by the district court and that it did not presume damages (Petition at 13-14), the plain language of the district court's order belies these assertions:

> I disagree with AT&T's contentions regarding the necessity of conducting individual inquiries on [the] element [of reliance] . . . . if a caller played the game and was charged more than he or she won in prizes, then the person was injured by reason of the game. The 900-numbers are not listed in any public telephone directory and are not otherwise in general circulation, so it may be reasonably assumed that the caller learned of the game and decided to play, at least in part, from the game's promotional materials

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Indeed, the district court itself expressly recognized in authorizing an appeal under 28 U.S.C. § 1292 that there were controlling questions as to whether it had applied the appropriate legal standard in certifying the class, particularly regarding its use of a presumption of reliance. (R13-287-3). *See, e.g., Simon v. G.D. Searle & Co.*, 816 F.2d 397, 400 (8th Cir. 1987) (court reviews *de novo* questions of law certified by the district court pursuant to 28 U.S.C. § 1292).

Finally, the Eleventh Circuit's decision does not, as Petitioners claim, resolve disputed issues of fact or overturn factual findings made by the district court. (*See* Petition at 13-14). In particular, Petitioners claim that the Eleventh Circuit overruled the district court's factual determination that all of the LMAD advertising was "substantially similar enough for class certification." (Petition at 14). But the Eleventh Circuit made no such finding. Rather, the Eleventh Circuit properly concluded that the district court erred in *assuming* "that LMAD and its promotions were 'without material variation'" when it was undisputed that most of the advertising is no longer available for review[14] and Petitioners' own expert conceded that the advertisements that were available "'vary in terms of their

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> or from another person who learned of the game through those promotional materials.

(R-142-8-9); *see also* (R5-142-11-12) (district court certified class to include anyone who had "been billed" for calls to LMAD, without regard to whether they had paid for such calls, finding AT&T would not be "significantly" harmed to the extent some class members received "a double recovery").

14. Most of the advertising used for the LMAD game no longer exists. For instance, of the 119 different commercials broadcast on U.S.A., Teleline was only able to locate twelve. (R19-143-131; R5-140-tab 30). Even fewer of the print ads have been located. However, the advertising that is available definitively refutes the district court's presumption that all of the LMAD advertising was the same. (*Compare* R5-140-tabs 13, 14, 15, 29).

potential to deceive.'" *Sikes*, 281 F.3d at 1364. Thus, the Eleventh Circuit concluded:

> [t]he upshot of this is that each individual plaintiff is the only person with information about the content of the advertisement upon which he relied. Of course, a factfinder cannot determine whether an advertisement was misleading or fraudulent without knowing its content, and so each plaintiff will have to provide evidence of the particular advertisement(s) that he heard or saw. The court may not employ a presumption that all of the LMAD advertisements were misleading . . .

Id.

The review conducted by the Eleventh Circuit of district court certification decisions in general, and of the certification decision in this case in particular, is entirely consistent with the review standard applied by other Circuit Courts. The Eleventh Circuit's routine application of this well-established review standard presents no issue that warrants this Court's attention.

II. The Eleventh Circuit's Refusal To Allow Elements Of A Claim To Be Presumed In Order To Facilitate Class Certification Recognized A Well-Settled Rule Of Law And Presents No Issue For Review By This Court.

In *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 265-68 (1992), this Court confirmed that the "by reason of" language in 18 U.S.C. § 1964 requires that civil RICO plaintiffs prove a causal connection that includes both "but for" and "proximate" causation between a predicate act of mail or wire fraud and the claimed injury in order to recover. Consistent with this Court's decision in *Holmes*, the Circuit Courts uniformly have concluded that a civil RICO plaintiff alleging mail or wire fraud must prove that he was the target of a scheme to defraud and that he "relied to his detriment on

misrepresentations made in furtherance of that scheme." *Pelletier v. Zweifel*, 921 F.2d 1465, 1499-1500 (11th Cir.), *cert. denied*, 502 U.S. 855 (1991); *County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295, 1311 (2d Cir. 1990); *Ideal Dairy Farms v. John Labatt, Ltd.*, 90 F.3d 737, 746-57 (3d Cir. 1996); *Reynolds v. East Dyer Dev. Co.*, 882 F.2d 1249, 1253 (7th Cir. 1989); *Brandenburg v. Seidel*, 859 F.2d 1179, 1188 n.10 (4th Cir. 1988); *Grantham & Mann v. American Safety Prods.*, 831 F.2d 596, 606 (6th Cir. 1987); *Appletree Square I Ltd. Pshp. v. W.R. Grace & Co.*, 29 F.3d 1283, 1286 (8th Cir. 1994); *MGIC Indem. Corp. v. Weisman*, 803 F.2d 500, 504-05 (9th Cir. 1986); *Summit Props., Inc. v. Hoechst Celanese Corp.*, 214 F.3d 556, 562 (5th Cir. 2000).

Petitioners' contention that the Eleventh Circuit's refusal to presume reliance is outside the norm or precludes the use of circumstantial evidence in establishing class claims cannot be supported. Indeed, the Eleventh Circuit's position is consistent with the great weight of authority that has rejected the device of presuming the element of reliance outside of the context of securities fraud claims. *See Securities Investor Protection Corp. v. BDO Seidman, LLP*, 222 F.3d 63, 73 (2d Cir. 2000) (recognizing that "federal courts repeatedly have refused to apply the fraud on the market theory to state common law cases despite its wide acceptance in the federal securities fraud context"); *Summit Props., Inc.*, 214 F.3d at 561 ("No court has accepted the use of the [fraud on the market] theory outside of the context of securities fraud . . ." and rejecting its use in RICO claim predicated on fraud); *Perrone v. GMAC*, 232 F.3d 433, 439-50 (5th Cir. 2000), *cert. denied*, 532 U.S. 971 (2001) (refusing to apply *Affiliated Ute*'s presumption of reliance in TILA action); *Murphy v. Sofamor Danek Group*, 123 F.3d 394, 403 (6th Cir. 1997), *cert. denied*, 523 U.S. 1106 (1998) ("Neither the courts of Tennessee nor federal courts applying Tennessee law have held that the fraud-on-the-market theory is enough to satisfy the reliance requirement for common law purposes"); *Appletree Square I*, 29 F.3d at 1287 (refusing to presume reliance via fraud-

on-the-market theory in RICO action involving real estate; unlike the stock market, real estate market was not a "well-developed" market in which the price reflected all publicly available information); *Amaco Enters., Inc. v. Smolen*, 1995 U.S. App. LEXIS 20486, *4 (9th Cir. 1995) (finding that California Supreme Court has specifically declined to incorporate the *Affiliated Ute* presumption of reliance into California tort law, Ninth Circuit held that element of reliance could not be presumed in common law fraud claim); *Hudson v. Delta Airlines*, 90 F.3d 451, 457 (11th Cir. 1996), *cert. denied*, 117 S. Ct. 1082 (1997) (class certification properly denied for breach of fiduciary duty claim under ERISA; even if a uniformly false message had been used, class members still would have to prove that they "would have deferred their retirement in the hope that they would be eligible for the Special Retirement Plan to be offered in the future. [footnote omitted] This sort of decision would necessarily have been highly individualized for each potential retiree."); *Rosentstein v. CPC Int'l, Inc.*, 1991 U.S. Dist. LEXIS 200 (E.D. Pa. 1991) (presumption of reliance cannot be made in "non-perfect" markets, such as consumer market); *Martin v. Dahlberg, Inc.*, 156 F.R.D. 207 (N.D. Cal. 1994) (even if representations regarding effectiveness of product were misleading, plaintiff's RICO claims predicated on fraud could not be certified as reliance could not be established simply by showing defendant's course of conduct; reliance was an individual, fact-specific inquiry based on a myriad of factors); *In re Ford Motor Co. Vehicle Paint Litig.*, 182 F.R.D. 214 (E.D. La. 1998); *Strain v. Nutri/System, Inc.*, 1990 U.S. Dist. LEXIS 17031 (E.D. Pa. 1990); *Chin v. Chrysler Corp.*, 182 F.R.D. 448 (D.N.J. 1998).[15] And this Court has previously declined to review

15. Indeed, by employing presumptions of reliance, injury and damage in order to justify certification of the class, the district court effectively used the Federal Rules of Civil Procedure to alter substantive rights, a result forbidden by the Rules Enabling Act, 28 U.S.C. § 2072. *See Amchem Prods.*, 521 U.S. at 612 (courts must be "mindful that Rule 23's requirements must be interpreted in keeping with Article III (Cont'd)

Circuit Court decisions refusing to presume the element of reliance in non-securities fraud cases. *See Hudson*, *supra*, *Summit Props., Inc.*, *supra*, *Perrone*, *supra*, and *Murphy*, *supra*.

Each class member in this case would have had radically different experiences, knowledge and reactions regarding the 900-number advertising and the LMAD game. It is undisputed that neither named Petitioner ever actually called a LMAD 900-number or played the LMAD game; rather, both Mr. Sikes and Mr. Kemp seek to recover damages for calls made by children in their households. Neither Mr. Sikes nor Mr. Kemp ever saw any LMAD advertisements prior to receiving their phone bills, and they are unable to identify which advertisement, if any, their children saw, whether the children called LMAD in response to that ad, or even what might have been false, deceptive or misleading in any such advertisement. (R19-143-9-10, 14-15, 19, 22-23).

Additionally, a significant percentage of LMAD callers were repeat callers, and Petitioners' expert conceded that an individual who continued to call LMAD time after time, after receiving bills for his calls, could not show that he continued to be deceived or relied on the advertising in calling. (R19-143-81, 150, 171, 189; R14-285-Ex. A-75-77, 79-81, 129). *See, e.g., Carroll v. Cellco Pshp.*, 713 A.2d 509, 518 (N.J. Super. 1998) (fraud claims premised on similar contracts required individual proof of reliance; "a plaintiff who claimed to be defrauded but who renewed the contract for the next year would have a serious credibility problem"). Petitioners' expert also admitted that because the reasons motivating someone to call LMAD would vary from person to person, and individual consumers received different information regarding LMAD, it was impossible to determine which customers actually were

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constraints and with the Rules Enabling Act . . ."); *Alabama v. Blue Bird Body Co., Inc.*, 573 F.3d 309, 318 (5th Cir. 1978) (proof required to establish a claim can in no way hinge on whether the action is brought on behalf of a class under Rule 23).

deceived. (R14-285-Ex. A-54, 56-58, 69-72, 75-77, 79-81, 90, 94-95, 118-19, 124).[16] Thus, Petitioners' own evidence demonstrated that there was no factual basis upon which any presumption of reliance could possibly be predicated. *Strain*, 1990 U.S. Dist. LEXIS 17031, *22 (presumption of reliance inappropriate where alleged misrepresentations in advertisements for weight loss center did not occur "in a single place, at the same time, or under identical conditions").[17]

Petitioners also are incorrect in asserting that the Eleventh Circuit's decision effectively precludes the use of circumstantial evidence in establishing the element of reliance. Presuming the element of reliance is simply not the same as proving that element using circumstantial evidence. *See Washburn v. Kansas City Life Ins. Co.*, 831 F.2d 1404, 1411 (8th Cir. 1987) (while fraud may be established by circumstantial evidence, "it may not be presumed"). And the Eleventh Circuit explicitly stated that its decision *did not* mean that only direct evidence, and not circumstantial evidence, could be used to establish the element of reliance in a class action, only that this element could not be presumed. 281 F.3d at 1363 n.32.

In the absence of a presumption, whether class members reasonably relied will be dependent upon what each of them read, heard and understood, and what actions, if any, each of them took based upon such representations. Such proof would require "each class member to narrate a story which includes individualized proof of which advertisements he saw and whether they indeed [called] in reliance of those advertisements.

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16. The district court similarly acknowledged that different reasons or motivations, entirely unrelated to the advertising used, could have influenced consumers' decisions to play LMAD. (R19-143-223).

17. The impropriety of presuming reliance is further evidenced by the fact that in *Andrews*, the district court ultimately granted summary judgment to AT&T on all of the individual plaintiffs' RICO claims predicated on fraud, finding that *none* of them could establish the essential element of reliance. *See Harper v. AT&T*, 54 F. Supp.2d 1371, 1382-85 (S.D. Ga. 1999).

[footnote omitted] There are no short-cuts." *Strain*, 1990 U.S. Dist. LEXIS 17031, *22.

The Eleventh Circuit's conclusion that reliance could not be presumed, and that conducting individual reliance inquiries would overwhelm any common issues, raises no new or novel issue of any importance; it is a straightforward application of settled law. *See Basic Inc. v. Levinson*, 485 U.S. 224, 242 (1988) ("Requiring proof of individualized reliance from each member of the proposed plaintiff class effectively would have prevented respondents from proceeding with a class action, since individual issues then would have overwhelmed the common ones."); *Castano*, 84 F.3d at 745 ("fraud class action cannot be certified when individual reliance will be an issue"); *Broussard*, 155 F.3d at 342 (because reliance is an individual issue which "'must be applied with factual precision,'" fraud claims do not provide a "'suitable basis for classwide relief'") (citation omitted); *Mulligan v. Choice Mortg. Corp. USA*, 1998 U.S. Dist. LEXIS 13248 (D.N.H. 1998) (majority view is that certification is inappropriate when individual reliance is an issue, denying certification of RICO claims predicated on fraud); *Rosentstein*, 1991 U.S. Dist. LEXIS 200; *Martin*, 156 F.R.D. 207; *Strain*, 1990 U.S. Dist. LEXIS 17031; *In re Ford Motor Co. Vehicle Paint Litig.*, 182 F.R.D. 214 (E.D. La. 1998); *Cichonski v. American Inventors Corp.*, 1995 U.S. Dist. LEXIS 16563 (E.D. Pa. 1995); *Mack v. GMAC*, 169 F.R.D. 671 (M.D. Ala. 1996); *Freedman v. Arista Records, Inc.*, 137 F.R.D. 225, 229 (E.D. Pa. 1991).

III. There Is No Conflict Among The Circuits Regarding The Standard For Certifying A Nationwide Class That Will Require The Application Of The Laws Of All Fifty States.

In addition to fraud, Petitioners' RICO claims also are predicated on allegations of illegal gambling. In certifying the class, the district court recognized that it would be required to apply the gambling laws of all fifty states, but nonetheless

concluded that because the required inquiries into the various state laws "would share many common questions," these individual inquiries would not predominate. (R13-287-3; R5-142-10). Petitioners, however, never provided an analysis of the various states' gambling laws; instead, the district court simply assumed that those laws would raise common questions and could be manageably applied in a class action. *Sikes*, 179 F.R.D. at 348.

The Eleventh Circuit properly rejected this unfounded assumption as a matter of law. Courts uniformly recognize the potentially overwhelming manageability problems associated with applying the laws of all fifty states. *See Castano*, 84 F.3d at 741-43 and n.15 ("We find it difficult to fathom how common issues could predominate in this case when variations in state law are thoroughly considered."); *Georgine v. Amchem Prods.*, 83 F.3d 610, 627 (3d Cir. 1996) (necessity of applying individualized choice of law analysis "compounded exponentially" individual issues in class action because states had "different rules governing the whole range of issues raised by the plaintiff's claims"), *aff'd*, 521 U.S. 591 (1997); *Ex parte Green Tree Fin. Corp.*, 723 So.2d 6 (Ala. 1998) ("we have grave concerns as to whether any national class of plaintiffs in an action involving the application of the differing laws of numerous states can satisfy" the requirements of predominance and superiority); *Chin*, 182 F.R.D. at 461 (declining to certify class which would require the application of the laws of all fifty states; "it remains true that no federal court has attempted to try a case under the laws of every state").

The Eleventh Circuit applied mainstream law when it refused to sustain a certification order that was premised on an unfounded assumption that the gambling laws of all fifty states were similar. *See Walsh*, 807 F.2d at 1017 (class proponent must provide an "extensive analysis" of state law variations regarding all pertinent state law issues, and establish that the application of each state's law would not pose "insuperable

obstacles" to class certification); *Castano*, 84 F.3d at 741-43 (finding district court did not properly consider how variations in state laws might affect predominance inquiry); *Stirman v. Exxon Corp.*, 280 F.3d 554, 564 (5th Cir. 2002) ("A cursory review of state law variations is not sufficient" to establish predominance); *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1188 (9th Cir. 2001); *Spence*, 227 F.3d at 313; *Chin*, 182 F.R.D. at 461; *Martinez v. Weyerhaeuser Mortg. Co.*, 1997 U.S. Dist. LEXIS 22172, *11-12 (S.D. Fla. 1997); *Wilkes v. Ford Motor Co. (In re Ford Motor Co. Ignition Switch Prods. Liab. Litig.)*, 174 F.R.D. 332, 350 (D.N.J. 1997) (plaintiff has the burden of "designing a workable plan for trial embracing all claims and defenses prior to class certification"). *See also Bill Heard Chevrolet Co. v. Dixon*, 2001 Ala. LEXIS 383, *18 (Ala. 2001); *Washington Mutual Bank v. Superior Court*, 15 P.3d 1071, 1085 (Cal. 2001); *Southwestern Refining Co. v. Bernal*, 22 S.W.3d 425, 435 (Tex. 2000).

The Eleventh Circuit's decision represents a straightforward application of this well-established legal standard. Because Petitioners made no attempt in the district court to demonstrate affirmatively that the gambling laws of all fifty states could be manageably applied, it was legal error for the district court to assume that this Rule 23 requirement was met.[18] *See Andrews*, 95 F.3d at 1024 ("'class action proponents must

18. Petitioner's failure is understandable since even a cursory review of gambling statutes and related laws reveals that states vary considerably as to whether, and under what circumstances, recovery for a gambling debt may be had, the level of scienter which must be proven, and how the elements of prize, chance and consideration are interpreted. *Compare Glick v. MTV Networks*, 796 F. Supp. 743, 748 (S.D.N.Y. 1992) (alternative free method of entry removed 900-number promotion from ambit of New Jersey's gambling or lottery laws) with *State v. Schubert Theatre Players Co.*, 281 N.W. 369 (Minn. 1938) (drawing was illegal despite free method of entry). Indeed, in rendering judgment on the individual claims in *Andrews*, the district court concluded that the 900-number programs at issue violated Georgia's and Nebraska's gambling laws, but not the gambling laws of California.

do more than merely assert that variations in state law are insignificant or 'academic'; court cannot take class proponents' interpretations of law 'on faith.'"") (citation omitted); *Walsh*, 807 F.2d at 1016 (to justify class treatment, class action proponent must show that no variations in applicable states' laws exist); *Wilkes*, 174 F.R.D. at 342 (denying certification where Petitioners failed to demonstrate realistic plan for trying class claims that arose under differing states' laws); *In re Stucco Litig.*, 175 F.R.D. 210, 216 (E.D.N.C. 1997) (although plaintiff suggested that state law differences were minor, "[t]he devil . . . is in the details").[19]

Indeed, Petitioners made no attempt before the Eleventh Circuit to support the district court's conclusion that it could manageably apply the gambling laws of all fifty states. Instead, Petitioners argued that the district court's choice of law analysis was erroneous and that, at most, the gambling laws of four states would be applicable, a task Petitioners claimed would be manageable.[20] As the Eleventh Circuit recognized, however, Petitioners failed to preserve this choice of law issue on appeal due to their failure to file a cross-appeal as required by Fed. R. App. P. 5(b)(2). *Sikes*, 281 F.3d at 1367 n.44. Having

19. In an effort to bolster their claim that this case can be effectively managed, Petitioners erroneously suggest that the parties jointly agreed to have this case tried by the district court. (Petition at 8). In fact, having demanded a jury trial in their initial pleadings, Petitioners sought to withdraw that demand after the Eleventh Circuit rendered its decision in *Andrews* by filing amended responses to the Southern District's mandatory interrogatories stating that they desired a non-jury trial. (*See* Petition App. at 103, 108 (Plaintiffs' 3/10/97 Supplemental Responses to Rule 8.6 Interrogatories)). This unilateral attempt to avoid a trial by jury, more than four years after having demanded a jury trial and after the district court certified the class based on that demand, contravenes Fed. R. Civ. P. 39(a) and is ineffectual. *See, e.g., Johnson v. Penrod Drilling Co.*, 469 F.2d 897, 903-04 (5th Cir. 1972).

20. Before this Court, Petitioners contend that the gambling laws of only two states, Missouri and Illinois, need to be applied to the claims of class members nationwide. (Petition at 27).

failed to argue before the Eleventh Circuit that the district court correctly concluded that the gambling laws of all fifty states could be manageably applied, this issue presents no basis for review by this Court.

CONCLUSION

This case presents no issue that merits this Court's attention or review. The Eleventh Circuit's decision involves the application of well-established legal principles and is consistent with other Circuit Court decisions.

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In The
Supreme Court of the United States

JAMES W. SIKES and FELIX KEMP, Individually and on Behalf of All Other Persons Similarly Situated,

Petitioners,

v.

AMERICAN TELEPHONE & TELEGRAPH COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITIONERS' REPLY BRIEF

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TABLE OF CONTENTS

Page

I. Unlike Other Circuits, the Eleventh Circuit Has Engaged in De Novo Fact-Finding, Overruling the District Court's Findings, in Order to Decertify Class Actions 1

II. Other Circuits Do Not Conclude That the Issue of Class Members' Reliance in Mass Mail and Wire Fraud Cases Per Se Prevents Class Treatment 3

III. Other Circuits Do Not Conclude That Proposed Nationwide Class Actions Involving the Application of the Laws of Multiple States Per Se Cannot Be Certified 4

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Castano v. American Tobacco Co., 84 F.3d 734 (5th Cir. 1996) 5

Colonial Refrigerated Transportation, Inc. v. Mitchell, 403 F.2d 541 (5th Cir. 1968) 3

Eisenberg v. Gagnon, 766 F.2d 770 (3d Cir. 1985) 2, 4

Georgine v. Amchem Prods., 83 F.3d 610 (3d Cir. 1996), *affirmed*, 521 U.S. 591 (1997) 5

Heastie v. Community Bank of Greater Peoria, 125 F.R.D. 669 (N.D. Ill. 1989) 4

In re Visa Check/Mastermoney Antitrust Lit., 280 F.3d 124 (2d Cir. 2001), *cert. denied*, 2002 WL 554313 (U.S.) 2

Kahan v. Rosenstiel, 424 F.2d 161 (3d Cir.), *cert. denied*, 398 U.S. 950 (1970) 2

Mulligan v. Choice Mortgage Corp., 1998 WL 544431 (D.N.H. 1998) 3, 4

Sikes v. Teleline, Inc., 281 F.3d 1350 (11th Cir. 2002) 3, 4

Sikes v. American Tel. & Tel. Co., 179 F.R.D. 342 (S.D. Ga. 1998) 2

Smith v. MCI Telecommunications Corp., 124 F.R.D. 665 (D.Kan 1989) 4

Spence v. Glock, 227 F.3d 308 (5th Cir. 2000) 5

Walsh v. Ford Motor Co., 807 F.2d 1000 (D.C. Cir. 1986) (Ginsberg, J. and Edwards, J.), *cert. denied*, 482 U.S. 915 (1987) 6

Yaffe v. Powers, 454 F.2d 1362 (1st Cir. 1972) 2

TABLE OF AUTHORITIES – Continued

Page

FEDERAL STATUTES

Fed.R.Civ.P. Rule 23 1

PETITIONERS' REPLY BRIEF

Respondent AT&T's Brief in Opposition actually *highlights* how the "routine application of settled law" in the Eleventh Circuit (Opp. Br. at 1) embodies a class action jurisprudence sharply at variance with the law in other circuits and emphasizes the need for guidance from this Court. The Eleventh Circuit is adopting *per se* rules forcing district courts to reject class certification of *any* cases involving consumer deception – a paradigmatic aggregated small claim context in which the effective functioning of Rule 23 is critical – and to refuse class treatment of *any* claims involving aspects of multiple states' laws, even when the district courts make factual findings that strongly support class certification according to any fair application of Federal Rule 23.

I. Unlike Other Circuits, the Eleventh Circuit Has Engaged in *De Novo* Fact-Finding, Overruling the District Court's Findings, in Order to Decertify Class Actions

The district court based its class certification decision largely on its knowledge of the disputed issues and its review of the evidence available to try the case (which had emerged after lengthy discovery and evidentiary-type hearings). The district court concluded, for example, that AT&T's billing records sufficed as evidence of each proposed class member's calls to the "Let's Make a Deal" phone lines and the charges levied for those calls; that class members' reliance on the deceptive advertisements could be established on a class basis because the "900" telephone numbers called by class members appeared only in those ads; and that the ads and the call-in programs were sufficiently similar in the respects relevant to plaintiffs'

claims that divergent evidence would not proliferate or prove to be unmanageable. *Sikes v. American Tel. & Tel. Co.*, 179 F.R.D. 342, 347 (S.D. Ga. 1998).

The Eleventh Circuit did not accept those facts and then decide that the district court had applied the law to them incorrectly. Instead, the appellate court simply re-wrote the facts.

The Eleventh Circuit went so far as to label the district court's reference to the evidentiary value of AT&T's business records as an unfounded "legal presumption." *Sikes v. Teleline, supra,* 1365. The Eleventh Circuit found, as a matter of fact, that the only probative evidence of whether AT&T was paid for a charge is the customer's own word and personal records. *Id.* Contrary record evidence was accorded no probative value by the Eleventh Circuit.

The above illustrates the present methodology by which the Eleventh Circuit applies the abuse of discretion standard. Such is in stark contrast to the review exercised by other circuits of orders that certify class actions. *E.g.*, *In re Visa Check/Mastermoney Antitrust Lit.*, 280 F.3d 124, 140 (2d Cir. 2001), *cert. denied*, 2002 WL 554313 (U.S.); *Eisenberg v. Gagnon*, 766 F.2d 770, 785 (3d Cir. 1985); *Yaffe v. Powers*, 454 F.2d 1362, 1365 (1st Cir. 1972); *Kahan v. Rosenstiel*, 424 F.2d 161, 169 (3d Cir.), *cert. denied*, 398 U.S. 950 (1970).

This method of appellate decision-making invaded the district court's fact-finding prerogative and leaves all district courts in the circuit thoroughly confused about how to decide certification motions (short of *per se* denial, which may contradict obvious reality). Exercise of this Court's supervisory power is appropriate to remedy the

Eleventh Circuit's usurpation of the district court's fact-finding job.

II. Other Circuits Do Not Conclude That the Issue of Class Members' Reliance in Mass Mail and Wire Fraud Cases *Per Se* Prevents Class Treatment

Reliance has emerged as the critical issue in deciding on class treatment in cases involving consumer deception (often under the federal mail and wire fraud statutes), because some courts, including the Eleventh Circuit in this case, hold that a person's reliance on defendant's deception can be proved only if that person (and therefore each class member) testifies – which typically is then said to render the case unmanageable as a class action. *Sikes v. Teleline, Inc.*, 281 F.3d 1350, 1361 (11th Cir. 2002); *Mulligan v. Choice Mortgage Corp.*, 1998 WL 544431, p.6 (D.N.H. 1998). As described in the Petition, the result has been chaos in how class actions are handled in the various circuits.

This case presents an excellent example of how class actions that present the question of plaintiffs' reliance (on defendants' deceptive misconduct) can be managed, using normal rules of circumstantial evidence, inferences, and rebuttable factual presumptions that have roots in well-accepted common law. It *does* make sense to conclude (or infer, or presume), in assessing the manageability of a class action, that a plaintiff relied on defendants' deceptive advertisement if the phone number called by the plaintiff appeared only in that ad and could have been the only basis for causing a call to be made to AT&T's 900 number. Causation and reliance under such facts are thus susceptible to proof by class-wide evidence. *See Colonial Refrigerated*

Transportation, Inc. v. Mitchell, 403 F.2d 541, 549 (5th Cir. 1968) ("In law, as elsewhere, actions may speak louder than words.") In other cases, comparable persuasive evidence might not appear, which is why any *per se* approach would be wrong. At present, the circuits are at odds as to whether the presence of reliance as an element in a proposed class action *ipso facto* dooms class treatment. Compare *Sikes v. Teleline, supra*, with *Eisenberg v. Gagnon*, 766 F.2d 770, 786 (3d Cir. 1985). *See Mulligan, supra*, p.6; *Heastie v. Community Bank of Greater Peoria*, 125 F.R.D. 669 (N.D. Ill. 1989); *Smith v. MCI Telecommunications Corp.*, 124 F.R.D. 665 (D.Kan 1989). The viability of many consumer deception class actions in the federal courts (pleading federal mail or wire fraud violations, for example) depends on how this issue is resolved. Certiorari should be granted, and this Court should return the determination of how the reliance issue may affect class certification to the district courts, which can determine on the specific facts of individual cases whether class treatment of that issue is appropriate.

III. Other Circuits Do Not Conclude That Proposed Nationwide Class Actions Involving the Application of the Laws of Multiple States *Per Se* Cannot Be Certified

AT&T's arguments on the multiple state law issue demonstrate the ripeness of this issue for certiorari. AT&T again argues strongly for a *per se* rule – that class treatment must be rejected if the laws of multiple states apply to any issue in the case. As discussed in the Petition, the Eleventh Circuit's adoption of that rule, even when state law issues arise through incorporation in a federal statute, is at variance with the law in other circuits. Petition, p.25.

In some situations, the presence of multiple state law issues indeed should prevent class certification. In fact, AT&T cites cases that reject certification of national classes that assert purely state law causes of action, such as wrongful death or other state law torts involving bodily injury. *E.g.*, *Georgine v. Amchem Prods.*, 83 F.3d 610 (3d Cir. 1996), *affirmed*, 521 U.S. 591 (1997) (proposed class asserting present and future state law bodily injury tort claims against numerous defendants); *Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996) (class purporting to represent all tobacco-addicted smokers and their heirs against all tobacco companies asserting *inter alia* state law fraud, negligence, warranty, consumer, and strict liability claims); *Spence v. Glock*, 227 F.3d 308 (5th Cir. 2000) (putative class that implicates the tort policies of all 51 jurisdictions of the United States).

But there is a division among the circuits, as described in the Petition, whether that conclusion should apply in all cases. This action, asserting as it does a federal cause of action (RICO gambling) involving a simple issue of state law that is easily applied to simple facts, provides an excellent example in which a *per se* rule is inadequate and counter-productive. The district court found, and clearly had a reasonable basis for doing so, that multiple state gambling laws did not present undue manageability problems, because the variations were in fact fairly modest with respect to the issues in this case (the only relevant aspect of gambling law that varied among states was whether a "free alternative means of entry" provided an effective gambling exception). Instead of the Eleventh Circuit's *per se* rule, the approaches in other circuits that at least allow consideration of and

deference to the district court's reasons for concluding that class treatment is manageable should be adopted.

AT&T cites the well-reasoned opinion in *Walsh v. Ford Motor Co.*, 807 F.2d 1000 (D.C. Cir. 1986) (Ginsberg, J. and Edwards, J.), *cert. denied*, 482 U.S. 915 (1987). *Walsh* conflicts squarely with the Eleventh Circuit's *per se* rule barring national class actions that include a state law issue. The District of Columbia Circuit recognized the viability of a nationwide class action involving a state law issue so long as the district court determines that variations in state law "can be effectively managed." *Id.* at 1017. That court of appeals validated the appropriateness of certification of a nationwide class "if [plaintiffs] proffered strong indication that major factual issues in each class member's claim . . . are 'identical or virtually so.'" *Id.* As AT&T itself demonstrates, the only open gambling issue – the effectiveness of a free alternative means of entry – is quite manageable and, in fact, already has been managed by the district court in related litigation, Opp. Br. at 24 n.18, which further demonstrates the need to restrict appellate intrusion on the district court's fact-finding. Yet, in this case, the Eleventh Circuit sharply diverged from the better approach taken in other circuits, as exemplified by *Walsh,* and insisted on applying its *per se* rule in order to decertify the class.

The circuits are split. This Court's guidance is needed. Certiorari should be granted.

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